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**Information  
Commissioner**

*QUEENSLAND*

Freedom of Information

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**ANNUAL REPORT 2003-2004**

29 October 2004

The Honourable R K Hollis MP  
Speaker of the Legislative Assembly  
Parliament House  
George Street  
BRISBANE Q 4000

Dear Mr Speaker

I am pleased to present to Parliament the twelfth annual report of the Office of the Information Commissioner, which covers the 2003–2004 financial year. This report provides a comprehensive review of our activities and achievements. It reflects our performance against our strategic plan for 2003-2007 and fulfils statutory reporting requirements.

Yours sincerely,



D J Bevan  
Information Commissioner

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Copies of this report are available on our website at <http://www.infocomm.qld.gov.au> and further copies are available on request to:

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# our mission

*Fostering openness and accountability of government in Queensland by promoting lawful, fair and reasonable administration of Freedom of Information legislation*

## Our values

- Independence
- Integrity
- Service to the community
- Objectivity
- Respect for the law
- Respect for the rights of the individual

## Our goals

- 1 An expert forum for review of disputes under FOI legislation
- 2 Informal and flexible resolution of disputes
- 3 Better understanding by agencies and the community of FOI legislation
- 4 A progressive, client-focussed organisation

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# message from the information commissioner



David Bevan, Information Commissioner

It has been another busy and successful year for the Office of the Information Commissioner. Significant achievements were made in both of the Office's two main areas of work. These are our core business of resolving applications for review, and the provision of information and assistance activities to improve understanding by agencies and the community of rights and obligations under the *Freedom of Information Act* (FOI Act).

## Case resolution

We finalised 256 applications for review during the reporting period, exceeding our target of 250. We also received 287 new applications, 75 more than last year, representing a 35% increase. It is difficult to identify a particular reason for the significant increase in new appeals, except perhaps for the extensive media coverage given to various FOI issues that have arisen throughout the year. There were 92 applications on hand at 30 June 2004, compared with 61 applications on hand at 30 June 2003. This reflects not only the increase in new files received this year, but also the fact that nearly 34% of new applications were received in the last three months of the year. This left limited time within which to resolve those applications by the close of the financial year.

Informal feedback received from some central agencies indicated that they experienced a

corresponding increase in FOI access applications during the reporting period. That increase, and the associated resourcing implications, meant that some agencies experienced difficulty in making their decisions on access within the time limits prescribed by the FOI Act. This, in turn, increased the number of applications for review received by my Office because agencies that fail to meet these time limits are deemed to have refused to grant access to documents.

We significantly reduced the proportion of cases on hand that are more than 12 months old, from 37% as at 30 June 2003 to 22% as at June 2004. We also performed well in the area of timeliness of resolution of applications. A total of 68% of applications were resolved within three months, 85% were resolved within six months, and 94% were resolved within twelve months. These results are largely attributable to our continuing focus on resolving applications informally wherever possible—by mediation, negotiation or conciliation with the participants. In fact, almost 84% of our reviews were finalised informally this year.

## Information and assistance activities

Goal Three of the Office's Strategic Plan 2003-2007 is to promote better understanding by agencies and citizens of rights and requirements under the FOI Act. Accordingly, each year, we allocate staff to develop and implement information and assistance activities, designed to improve understanding by agencies and the community about the operation of the FOI Act.

The demand for the service which the Office provides in this area can be demonstrated by the fact that this year we dealt with more than 400 general requests from agencies and members of the public for information and other assistance, compared with 267 requests in 2002-2003.

A major achievement in this area, during the reporting period, was the presentation by the Office of nine training sessions for local government FOI officers. These were held in Brisbane and around the State, and attended by

## message from the information commissioner

more than 100 officers from local government authorities. We will be providing more tailored training to FOI administrators (on a cost recovery basis) in 2004-2005. We will also present information sessions on the FOI Act to officers who are not agency FOI officers, and to community groups, on request.

The Office continued to publish its regular newsletter – vOICe – which is distributed by email to all FOI co-ordinators in Queensland government agencies and local authorities, and also posted on our website.

In the later part of the year external consultants were engaged to redesign and relocate the website, to improve both its useability and accessibility for FOI administrators and members of the public. Testing of the site and uploading of data was well-advanced at 30 June and the new site was on track to go “live” in August 2004.

A great deal of time and resources were spent during the year on preparing new Information Sheets (aimed at users of the FOI Act) and Practitioner Guidelines (aimed at FOI administrators) suitable for print and electronic distribution.

We also developed a “section index” which lists, under the relevant sections of the FOI Act, all of the significant decisions published by the Office, as well as giving a brief description of the issues considered in each decision.

Again, the Office received a great deal of positive feedback from FOI administrators about the value and usefulness of these research tools. Additional Information Sheets and Practitioner Guidelines will be progressively released in 2004-2005. All of this information is available from our website.

### **Improvements to systems and procedures**

An upgrade to the case management system used by the Office is planned for 2004-2005 to further enhance the tracking and timely management of cases and inquiries.

We have also continued to develop and revise our human resource policies and to implement our new performance management system.

I am proud of the achievements of the Office during the reporting period and of the continuing commitment and dedication shown by my officers to the principles underpinning freedom of information.

The Office will continue to support the integrity of Queensland’s FOI regime and to promote its benefits.



**David Bevan**  
**Information Commissioner**

# about the office of the information commissioner



## Role of the Office

The role of Information Commissioner is a key one in Queensland's freedom of information (FOI) system, which is based on principles that:

- information held by the government should be accessible to the community;
- people have a right to know about and to have access to information held by government about them; and
- public scrutiny of government information leads to greater accountability and efficiency.

Ultimately, a good FOI system enhances the democratic process. The role of the Office of the Information Commissioner is to independently review decisions of agencies under the *Freedom of Information Act 1992* (the FOI Act) taking into account those principles, while applying the exemptions from disclosure recognised in the Act for the protection of other essential public and private interests.

## The FOI Act

The FOI Act confers legally enforceable rights to:

- obtain access to documents held by government agencies and Ministers (subject to the limitations specified in the FOI Act); and
- seek correction of information relating to an individual's personal affairs if the information is inaccurate, incomplete, out-of-date, or misleading.

Those entitlements are subject to limitations to protect essential public and private interests. For example, information about the personal affairs of an identifiable individual will be exempt from disclosure to another person, unless there are public interest considerations favouring disclosure that outweigh the public interest in non-disclosure.

Staff of the Office aim to resolve the vast majority of cases informally through mediation, negotiation or conciliation between the parties involved in a dispute. Since the Office was established in 1992, approximately 70–80% of cases have been resolved in that way.

If disputes cannot be resolved informally, participants are given an opportunity to provide evidence and submissions in support of their cases, and the Commissioner or a delegate makes a decision in substitution for the agency decision under review. In those cases, the Commissioner or delegate acts as an independent statutory tribunal in the same way as the Commonwealth Administrative Appeals Tribunal, the Victorian Civil and Administrative Tribunal or the New South Wales Administrative Decisions Tribunal.

# about the office of the information commissioner

## Responsibility to Parliament

The Information Commissioner, as an officer of Parliament, is independent from Ministerial control. Consequently, the community can be confident that FOI external reviews will be carried out fairly and impartially.

Each year, the Commissioner makes an annual report to Parliament. The Legal, Constitutional and Administrative Review Committee of the Parliament (LCARC) may also require a report on a particular aspect of the Office's performance, but it cannot investigate particular conduct or reconsider or review decisions in relation to a particular investigation.

An independent strategic review of the Office is carried out at least every five years and the report of the review referred to LCARC for its consideration. LCARC is presently monitoring the Office's implementation of recommendations from a strategic review conducted in 2000.

The Commissioner meets with LCARC twice each year to discuss issues such as the Office's activities and work output, budget, annual report, and any other significant issues.

## Powers

The essential functions of the Office are to:

- review any decision made by an agency or Minister in relation to an application made under the FOI Act, and decide any matter in relation to the application that could, under the FOI Act, have been decided by the agency or Minister; and
- affirm, vary or set aside the decision under review.

The Commissioner also has power to:

- attempt to effect an informal settlement;
- require production of documents and information from agencies and any other person;
- determine the procedures to be followed in a review and give directions; and
- refuse to review a decision if the application is frivolous, vexatious, misconceived or lacking in substance.

## Limits on powers

The Commissioner's powers are limited to reviewing the categories of decision specified in s.71 of the FOI Act.

The Commissioner is not able to make a decision about other forms of access or amendment, or to direct an agency to disclose matter that qualifies for exemption, nor to make decisions about general matters of administration of the FOI Act within agencies.

However, in trying to achieve an informal settlement, staff of the Office are able to raise with agencies possible avenues for resolution outside the FOI Act. If informal settlement cannot be achieved, the Commissioner (or a delegate) must make a decision applying the provisions of the FOI Act.



# about the office of the information commissioner

## Who can lodge an FOI application?

Any person, whether an individual or a corporate entity, can apply for access to documents under the FOI Act. An individual can also apply for amendment of information that relates to his or her personal affairs. Applications are dealt with in the first instance by the agency that possesses or controls the relevant documents.

Applicants who are unhappy with an agency decision may seek internal review within the agency, unless the agency's principal officer made the initial decision. A person can only apply for external review by the Commissioner if:

- they have received a notice of an internal review decision by the agency; or
- the initial decision was made by the agency's principal officer; or
- the prescribed time limit for making the agency decision has expired.

## What happens when an external review application is lodged?

When an external review application is lodged, staff of the Office make preliminary inquiries to establish whether the Information Commissioner has jurisdiction to conduct a review, and to ascertain whether there are any third parties who need to be consulted about the review.

In most cases, our officers contact the applicant and the respondent agency to learn about the background to the case, and explore whether there is any way to informally settle the dispute, or to reduce the number of issues in dispute. This may be done by way of a phone call, a letter, or a face-to-face meeting.

In the reporting period, almost 84% of cases were resolved completely in this way. In most of the remaining cases, the scope of the documents or issues in dispute were considerably reduced.

If informal methods are not successful in completely resolving the dispute, the participants are given the opportunity to lodge submissions and evidence, usually in writing, about issues that could be decided against them. The Commissioner or a delegate then makes a decision.

## Who becomes involved in external reviews?

External review applicants come from every part of society. Applications are made by:

- politicians;
- journalists;
- citizens groups;
- public servants;
- businesses;
- people who have made complaints to a government or regulatory body;
- people who have been the subject of complaint to a government or regulatory body;
- people seeking access to their own or a relative's medical records;
- prisoners;
- people who seek documents for use in legal proceedings; and
- people seeking information about a government decision that has affected them.

Some people seek external review, or apply to be a participant in an external review, to object to disclosure of information that an agency has decided to disclose to another person under the FOI Act.

# about the office of the information commissioner

Details of the categories of applicants seeking access to documents in cases finalised during the reporting period are outlined at Appendix 1. (These figures do not include applications made by people seeking to amend information).

Of note is the increase in the proportion of broad 'public interest applicants' - i.e. politicians, journalists, citizens groups, and persons seeking information about public health and safety issues. In 2002-2003 this group fell to 8% of applicants, as compared to 17% in the previous reporting period. In 2003-2004 it increased again to 14%. The Opposition parties and journalists have made the bulk of those applications.

## What decisions are disputed in external reviews?

A disputed decision may have been made by a Minister, a Queensland government department, another Queensland government agency or a local government. A breakdown of the type of decisions disputed in applications received during the reporting period appears at Appendix 2.

In the reporting period, the agencies that had the largest numbers of new external review applications were Queensland Health and its various Health Service Districts with 46 cases, and the Queensland Police Service with 33 cases.

Both agencies receive large numbers of FOI access applications, so it is not surprising that they are involved in a significant number of external reviews.

The Department of Corrective Services (17) was next, followed by Education and the Arts and the Department of Communities, formerly the Department of Families (each with 11).

The number of 'deemed refusal' applications, which fell by approximately 50% in 2002-2003 (to 26 from 54 in 2001-2002) increased this year to 44%. (An applicant is entitled to apply to the Information Commissioner for review of an agency's "deemed refusal" of an access or amendment application, if an agency has failed to give a notice of decision within the timeframes prescribed in the FOI Act.)

A number of agencies have informed my staff of having experienced unexpected increases in the number of new access applications received, leading to delays in processing access applications. This appears to be the explanation for the increase in deemed refusal applications.

A breakdown of the agencies that were respondents to external review applications received in the reporting period appears at Appendix 3.

## Disputed decisions

Most of the applications for external review in 2003-2004 were from applicants who had been refused access to documents, or parts of documents, by an agency.

Significant numbers of applications are also made by:

- applicants for access to documents who have not received an agency decision within the time frames specified in the FOI Act (deemed refusal – 14%); and
- third parties who object to disclosure of documents which an agency has decided to disclose (6%).

A smaller number of applications relate to decisions imposing fees and charges (3%), and decisions refusing to amend information (3%).

# Strategic plan

**A strategic review of the Office is required at least once every five years. The report on an independent review of the Office (dated June 2000) recommended that the goals and strategies be reviewed:**

- **To ensure there was sufficient emphasis. on timely and responsive resolution of external reviews; and**
- **To ensure the quality of decisions was not compromised by the emphasis on timeliness and responsiveness.**

**The Office of the Information Commissioner Strategic Plan 2003-2007 states the Office's mission and focuses on four strategic goals. The Strategic Plan:**

- **stresses the Office's independence and objectivity;**
- **notes that accountability and transparency are recognised as features underpinning all five policy priorities of the Queensland Government; and**
- **notes that access to information through FOI is recognised as a key strategy in achieving the Government's priorities.**

**Strategies were developed to help achieve each of the four goals as well as relevant performance measures. The following pages briefly outline those strategies and discuss the Office's achievements against performance measures during the reporting period.**

# goal 1

## Provide an expert forum for review of disputes under FOI legislation

*‘Investigating and reviewing decisions under FOI legislation in a timely and expert manner.’*

The primary object of the FOI Act is to enhance the accountability of government agencies. For practical purposes, it is necessary for the agencies themselves to make the initial decision as to what information should or should not be disclosed in response to an access application for agency information under the Act.

However, when an agency and an applicant are in dispute over the agency’s decision about an application, it is essential that a body independent of the executive government carry out the review of the disputed decision.

The decision-maker must be in a position to make decisions that analyse the relevant facts, the relevant provisions of the Act, other legal requirements, and prior authorities from Queensland and other jurisdictions, to arrive at the correct decision required by law in any given case.

The parties to any dispute are also entitled to a written decision that explains the reasoning adopted in reaching the decision on external review. Decisions by the Information Commissioner or a delegate have to be legally sound because they are subject to judicial review.

The Office of the Information Commissioner meets all of these criteria. Providing an effective, independent and expert forum for FOI review is its core business.

Decisions by the Information Commissioner or a delegate also provide precedents for decision-makers in agencies when interpreting and applying the Act in future cases. Hundreds of agencies in Queensland are called on to make decisions under the Act from time to time, and some deal with a large quantity of applications each year. Our decisions provide an authoritative reference point for decision-makers.



**Staff briefing**

Reviews that proceed to the stage of a formal decision often involve complex issues that require submissions and exchange of evidence. Reviews of this type naturally tend to take longer to resolve than those settled informally, but it is in the interests of the participants and the community generally that decisions are made as soon as possible.

Strategies adopted or continued in the reporting period to further this goal include:

- providing information to applicants, agencies and third parties to assist them to meet their obligations, understand the material issues, and follow correct procedures in external review applications under the FOI Act;
- providing effective training and mentoring for our staff in key areas, such as legal research and writing, and specific knowledge areas;
- monitoring relevant legislative change, judicial decisions and decisions of other comparable tribunals;
- utilising our electronic case management system to assist in the analysis of issues arising in applications for external review, and to monitor the timely progress of cases; and

# goal 1

- improving timeliness of less complex decisions by delegating the decision-making power to the Deputy Commissioner and Assistant Commissioners.

## Quality of decisions

One decision made during the reporting period was the subject of an application to the Supreme Court for judicial review, but that application was discontinued before the first appointed directions hearing in the Supreme Court.

**Performance target:** Quality

Proportion of decisions overturned by the Supreme Court in Judicial review proceedings.

Target	2001-2002	2002-2003	2003-2004
<3%	0%	0%	0%

**Comment:**

Each decision of the Commissioner must clearly state the reasoning underlying the decision in case it is challenged by judicial review. The decision must speak for itself, because a tribunal is not ordinarily permitted to play an adversarial role in defending a decision in the course of judicial review.

*‘The target for cases resolved informally was exceeded’*

## Number of decisions

In the reporting period, 42 applications for review were finalised by a decision on one or more issues that remained in dispute between the participants. The decisions are summarised at Appendices 4 and 5.

Figure 1 sets out the various outcomes for reviews resolved in this period and the previous two periods, including a breakdown of decision types (1–6).

Outcome of review	2001-2002	2002-2003	2003-2004
Decision affirmed	30	19	10
Decision varied	20	36	12
Decision set aside	14	8	9
Not reviewed because application frivolous, vexatious, misconceived or lacking in substance	1	3	0
Decision that Commissioner has no jurisdiction (where issue of jurisdiction disputed by parties)	2	1	3
Decision to grant agency further time to deal with application	0	3	8
Case settled informally	217	174	161
No jurisdiction	32	31	53
<b>TOTAL</b>	<b>316</b>	<b>275</b>	<b>256</b>

# goal 2

## Informal and flexible resolution of disputes

*‘Fostering timely, informal and inexpensive resolution of FOI applications by promoting flexible approaches to resolution by agencies and members of the community.’*

The Office’s primary focus is to attempt an informal dispute resolution that avoids the need to proceed to a formal decision-making process. Experience has shown that such an approach often leads to a speedier and less expensive resolution and provides a greater benefit to the

If a case cannot be resolved informally, staff will attempt to ensure that the participants agree on the issues in dispute under the FOI Act so that they can focus their attention on presenting relevant evidence and arguments on any issues on which a formal decision is required.

<b>Performance target:</b>	Quality		
Proportion of cases received that were resolved informally			
<b>Target</b>	<b>2001-2002</b>	<b>2002-2003</b>	<b>2003-2004</b>
70%	79%	74.5%	83.6%
<b>Comment:</b>			
This result exceeds the target. In fact, negotiation or mediation was attempted in approximately 95 per cent of cases received in the reporting period.			

Through involvement of agency staff in these informal resolution processes, agencies are encouraged to adopt a similar approach at the initial decision-making stage.

Strategies adopted or continued in the reporting period to further this goal include:

participants than a drawn-out argument over legal issues.

Staff of the Office try to establish the real issues in dispute between the participants. These may or may not be issues under the FOI Act. Staff then attempt to identify options, whether inside or outside the framework of the Act, for reaching agreement between the participants.

- continuing to emphasise the use of informal resolution strategies at every stage of the process, including adoption of problem-solving approaches to identify the real issues in dispute and possible alternative avenues for resolution;
- introducing a new position, Co-ordinator of Informal Resolution, to oversee the consistent implementation of informal resolution strategies;
- providing effective training and mentoring for staff in key areas, such as mediation, negotiation and conflict resolution;
- tailoring external review procedures whenever possible so as to encourage participants to take part in the process without feeling it necessary to engage legal representation, and to otherwise minimise the expense of the process for the participants; and
- continuing the Liaison Officer Program with agencies involved in significant numbers of external reviews, to streamline handling of external reviews with agencies and promote discussion of general issues relating to resolving FOI applications.

<b>Performance target:</b>	Quantity	
Cases finalised in reporting year		
<b>2001-2002</b>	<b>2002-2003</b>	<b>2003-2004</b>
316 (target:360)	275 (target:270)	256 (target:250)
<b>Comment:</b>		
There were 92 cases on hand at 30 June 2004, compared to 61 at 30 June 2003. The increased number of carried over cases is due to the increase in numbers of applications received in 2003-2004 (from 212 to 287). A large proportion of the new applications was received after March 2004, and they could not be resolved by 30 June 2004.		

# goal 2

Figure 2 (below) gives an overall picture of the applications received and finalised by the Office since the first application was received. In total, 3,035 applications have been received, with 287 applications this reporting period (an increase of 35% from the previous year).

The number of applications pending as at 30 June 2004 has increased by 52%, most of which represent applications received in the last two months of the year.

## Timeliness

During the reporting period, the average time to finalise cases was reduced by more than half from 34 to 16 weeks. 85% of cases were finalised within six months.

Over the next reporting period our priority will be to finalise applications more than 12 months old.

## Outcomes of reviews settled informally

Of the 161 cases resolved informally during the reporting period:

- 8 involved a dispute over fees or charges with the applicant obtaining a better outcome in only one case;
- 11 involved applications for amendment of information with the applicant obtaining an amendment or notation previously refused by the agency in five cases;
- 129 involved challenges to an agency's refusal of access to documents, with 75 (or 58%) resulting in the applicant obtaining access to some documents or information previously withheld;

Figure 2: Applications dealt with

Reporting period	Applications received	Applications completed	Applications pending at end of reporting period
18/1/1993 - 30/6/1993	120	27	93
18/1/1993 - 30/6/1993	274	179	242
18/1/1993 - 30/6/1993	223	179	286
18/1/1993 - 30/6/1993	209	203	292
18/1/1993 - 30/6/1993	231	246	277
18/1/1993 - 30/6/1993	210	270	217
18/1/1993 - 30/6/1993	291	301	207
18/1/1993 - 30/6/1993	327	352	185
18/1/1993 - 30/6/1993	376	393	165
18/1/1993 - 30/6/1993	275	316	124
18/1/1993 - 30/6/1993	212	275	61
18/1/1993 - 30/6/1993	287	256	92
<b>TOTAL</b>	<b>3,035</b>	<b>2,943</b>	

# goal 2

- 12 cases involved ‘reverse-FOI’ applications, seeking to overturn decisions by agencies to disclose documents to an applicant for access under the FOI Act (six of these cases were resolved in a manner that allowed the access applicant to obtain access to the information in issue, in whole or in part); and
- one case involved an applicant accepting that the Information Commissioner had no jurisdiction, and withdrawing the application for review.

**Performance target:** Timeliness

Proportion of cases finalised in reporting year that were finalised within 3, 6 and 12 months

Target	2001-2002	2002-2003	2003-2004
3 months 55%	50%	49%	68%
6 months 70%	66%	62%	85%
12 months 90%	80%	80%	94%

**Comment:**

The time taken to finalise reviews has been reduced, with over two-thirds finalised within three months.

**Proportion of open cases at the end of reporting year that are over 12 months old.**

Target	2001-2002	2002-2003	2003-2004
20%	39%	37%	22%
(Number)	48	23	20

**Comment:**

The priority which has been given to resolving older cases has resulted in a continuing decrease over the last three years. Most of the older cases on hand at 30 June 2004 were difficult or complex matters, or inter-related cases with similar issues to be resolved.



# goal 3

## Better understanding by agencies and the community of FOI legislation

*‘Participation in the democratic process is enhanced by a better understanding by agencies, and by the community generally, of the rights of citizens under the FOI Act.’*

Participation in the democratic process is one of the underlying rationales of freedom of information. Therefore, achieving a better understanding by agencies, and by the community generally, of the rights of citizens under the FOI Act is a worthy goal.

Better understanding should also lead to a reduction in applications to the Office involving issues that are clearly dealt with in the FOI Act, or that have previously been considered by the Information Commissioner. This allows the Office to concentrate its resources on timely resolution of disputes involving new or complex issues that require determination.

If applicants have access to basic information about their rights under the Act, and the processes involved in administering the legislation, they will be more likely to accept properly-based agency decisions. Similarly, if agencies have greater access to information about the Act, their decisions are more likely to be soundly based and will be less likely to be challenged.

Strategies adopted or continued in the reporting period to further this goal include:

- publishing high quality formal decisions that interpret and explain FOI legislation and illustrate the application of relevant principles in particular cases: these are published on our website (ordinarily within seven days), through the Australian Legal Information Institute (Austlii) website and in the Queensland Administrative Reports;
- publishing summaries of ‘letter decisions’ on the website, and making copies of the full text of those decision available on request;
- establishing a new position, Co-ordinator of Information and Assistance activities, to develop and oversee the implementation of the Office’s education and information activities;



The website redevelopment project has focused on ensuring logical and intuitive navigation from our users’ perspective and providing easy access to decisions online.

# goal 3

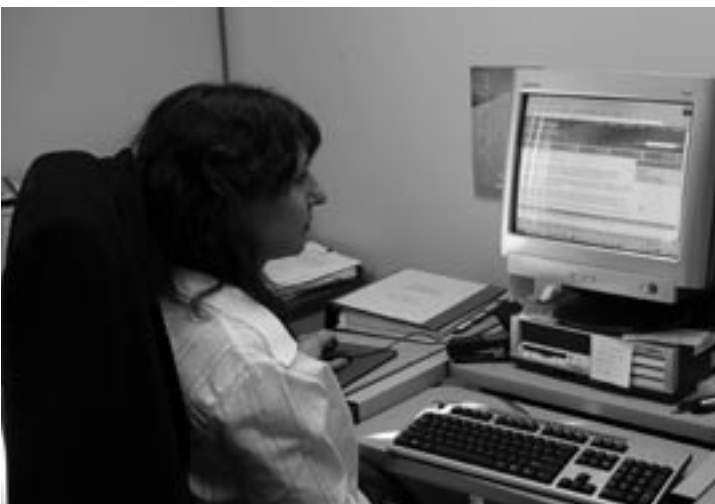
- publishing Information Sheets, which explain in straightforward language the Office's approach to resolving the most commonly encountered kinds of disputes under the Act;
- publishing Practitioner Guidelines providing detailed guidance on the correct interpretation and application of key provisions of the Act;
- publishing a newsletter (vOICE) that highlights recent developments in FOI and issues of significance identified by the Office or by agencies;
- providing information to agencies and members of the public about FOI legislation, procedural issues and past decisions (during the reporting period, the Office responded to more than 400 requests for information or assistance, compared to 267 in the previous year); and
- maintaining and developing the website to provide free public access to the Office's decisions and publications and other information about FOI.

Some of these initiatives are described in greater detail under Significant Issues.

To improve understanding of the FOI Act and establish better mechanisms for informal resolution of disputes, our staff are appointed as Liaison Officers for approximately 20 agencies that are involved in a substantial number of external review applications.

These officers provide a single point of contact for general queries by the agency FOI co-ordinator, and can also respond to agency concerns about timeframes we have imposed on the agency in the conduct of external reviews.

Each Liaison Officer meets regularly with relevant agency staff. At these meetings, a range of issues is explored and discussions held about ways to improve performance, both of this Office and of the agency concerned.



When the office's new website goes live, staff will have uploaded well over 4,000 pages of information.

# goal 4

## A progressive, client-focused organisation

*‘The Office is committed to providing services with high levels of effectiveness, efficiency and accountability.’*



**The majority of complaints are settled through mediation**

Much of the work in this area over the past 12 months has focused on ensuring staff are equipped to deliver the best possible service.

To gauge the impact of our approaches and to determine areas for improvement, this year we again surveyed applicants whose matters were finalised during the reporting period. The results show that applicants were generally positive, although concerns were still expressed about the time taken to finalise reviews, notwithstanding the significant improvements in timeliness achieved during the reporting period (see p.15).

Figure 3: Applicant satisfaction survey

Satisfaction with:	Number of respondents	%
The way the review was handled overall	95	76
How well the applicant's were answered	93	69
Telephone service overall	93	96
How easy letters were to understand	93	74
How easy Information Sheets were to understand (if an Information Sheet is provided)	41	78
How easy decisions were to understand (if a decision was issued)	15	73
Time taken to finalise review	95	54

Figure 3 below shows results from a representative sample of 17 questions put to applicants. It sets out the percentage of respondents who gave a rating of 1 or 2 (i.e., very good or good) on a five-point scale in relation to the Office's performance. Responses were received from 95 applicants for external review.

In addition to the survey of applicant satisfaction, we also conducted a survey in late 2003 of all agencies involved in cases finalised in the 2002-03 period.

The results show that agencies were mostly positive in their appraisal of the Office's performance.

Figure 4 below shows results from 12 questions put to agencies. As with Figure 3, it sets out the percentage of respondents who gave a rating of 1 or 2 (i.e., very good or good) on a five-point scale in relation to the Office's performance.

Responses were received from 73 agencies involved in external reviews (including 20 local authorities).

# goal 4

Figure 4: Agency satisfaction survey

Satisfaction with:	Number of respondents	%
Telephone service overall	52	98
How helpful face to face meetings were	31	97
How easy preliminary view letters were to understand	47	91
How useful preliminary view letters were	47	94
How easy decisions were to understand	52	81
How useful decisions were	49	92
Effectiveness of informal resolution strategies	44	93
Effectiveness of the procedural approach to dispute resolution in minimising costs	43	95
Effectiveness of the following resources in assisting agency functions under the FOI Act:		
- Website	47	85
- Information sheets	48	92
- Practitioner guidelines	46	91
- vOICE newsletter	46	87
Effectiveness of Liaison Officer program	17	65

## Corporate Services

The Queensland Ombudsman's Corporate Services unit delivers corporate service functions to the Office of the Information Commissioner. The Offices address many issues relevant to the achievement of this goal jointly and a more detailed discussion appears in the Ombudsman's Annual Report.

Strategies adopted or continued in the reporting period to further this goal include:

- utilising and monitoring the case and records management system;
- implementing an expanded Performance Planning and Review scheme;
- continuing to conduct surveys seeking feedback from applicants and agencies on various aspects of performance;
- identifying training requirements of the Offices and providing or accessing suitable training programs (e.g. in mediation skills);
- continuing to develop formal policies and practices for human resource management; and
- maintaining a commitment to continuous improvements in policies, systems and practices.

# Financial structure and corporate support

## Staff

The approved establishment at 30 June 2004 was:

- 1 Deputy Commissioner
- 1 Assistant Commissioner (So2)
- 2 Assistant Commissioners (Ao8)
- 2 Senior Administrative Review Officers (Ao7)
- 3 Administrative Review Officers (Ao6)
- 1 Executive Officer (AO4)
- 1 Legal Research Officer (AO3)
- 1 Administrative Assistant (AO2)

Temporary staff were also appointed to replace staff who were absent on maternity leave.

Staff of the Office come from a variety of backgrounds, with experience in the Queensland, New South Wales and Commonwealth public sectors, private legal practice and elsewhere in the private sector. Most are legally qualified and most also have formal qualifications, or have undertaken training, in alternative dispute resolution methods. At present, approximately 75% of staff are female.

### Figure 5: Distribution of staff by gender and classification

Gender distribution against role classification (effective workforce) as at 30 June 2004

Classification	Male	Female
SES2	1	
SO2		1
AO8		1.8
AO7	1	
AO6		3.8
AO4		1
AO3	0.6	
AO2		1
<b>Total</b>	<b>2.6</b>	<b>8.6</b>
% of whole	23.2%	76.8%



A Code of Conduct for staff is in place under the *Public Sector Ethics Act 1994*. The Code is available in electronic and hard copy forms and most staff have attended a group training session on the Code's application. New staff are provided a copy of the Code and training about it during their induction.

## Financial structure and corporate support

The Office's financial reporting is combined with reporting for the Queensland Ombudsman, as the two Offices operate under the same output: Independent review of complaints and appeals about government administration.

This output supports all five whole-of-government priorities established by the Queensland Government through the Corporate Governance framework.

The Queensland Ombudsman's Corporate Services Unit provides corporate services, including financial, personnel and information technology. Reporting requirements falling within those functions, including financial statements, are included in the Ombudsman's Annual Report.

In brief terms, expenditure in the reporting period on staff salaries and related expenditure for the Office of the Information Commissioner was \$924,545. Other expenses attributed to this Office, including an apportionment of the costs of the Corporate Services Unit, and the executive office of the Ombudsman and Information Commissioner, amounted to \$506,459.

# The future - outlook 2004-2005

*My office will continue to support the integrity of Queensland's FOI regime and to promote its benefits.*

## **The future – Outlook 2004–2005**

The Office will focus on a number of priorities in the coming year, including:

- the further development of information and assistance activities, including publishing further Information Sheets and Practitioner Guidelines about the Act and providing information, training and assistance to members of the public and FOI practitioners;
- launching the Office's new website, to improve public access to information about FOI and decisions of the Commissioner;
- reducing the number of cases over 12 months old;
- continuing to emphasise problem solving and informal resolution approaches;
- maintaining emphasis on timeliness of case resolution;
- refining and enhancing the case and records management system;
- continuing to implement the performance planning and review scheme;
- continuing to implement a strategic training plan for staff, with emphasis on strategic leadership, management and information technology; and
- finalising the review of terms and conditions of employment for staff and formalising key human resource management policies.

# Significant issues

## 1. Information and Assistance Activities

The strategic management review of the Office conducted in 2000 recommended that greater emphasis be placed on educational and training activities, to the extent that resources permitted.

The position of Co-ordinator of Information and Assistance was trialled in 2003 and a permanent appointment was made in September 2003 (at Assistant Commissioner level). The increased priority given to this area and the allocation of additional staff resources have enhanced the Office's ability to implement strategies to meet its goal (Goal 3) of improving understanding by agencies and the community of FOI legislation and the FOI process.

A number of key strategies, which have been reported on previously, have continued, along with the development of a range of new initiatives.

### Education and training

A major focus of Information and Assistance activities in the last 12 months has been the development and presentation of training for FOI practitioners and for more audiences.

We identified a particular need for training tailored to the needs of local government FOI officers because regional and rural Councils have limited access to training in their local areas, and many do not receive a sufficient number of FOI applications to develop expertise.

The first six sessions in the Local Government series were presented in August and September 2003 by the Co-ordinator, Information and Assistance, in conjunction with a consultant with over 20 years experience in FOI. Training was conducted in Bundaberg, Emerald, Mackay, Cairns, Toowoomba and Brisbane. A further three sessions were presented by staff of the Office, during December 2003, in Roma, Charleville and Townsville. In all, 107 staff from 55 local councils participated. The feedback was overwhelmingly positive, with participants appreciating the opportunity to develop their knowledge of the FOI

Act, discuss issues in processing FOI requests and explore case studies.

From time to time the Office also receives requests from agencies for in-house training for FOI co-ordinators and decision-makers, as well as requests for more general information sessions. A two-stage approach to training was developed for one agency, which was about to expand its role and increase staff numbers, and anticipated that its new responsibilities would give rise to a significant increase in FOI applications. Staff of the Office presented an information session on the FOI Act to senior management of the organisation as a precursor to a one-day training program for staff to be held in August 2004.

Other training activities have included:

- an information session on FOI for inspectors of an agency with a range of regulatory functions;
- a lecture to university justice studies students;
- briefings on recent decisions to agency FOI co-ordinators at regular meetings (an ongoing initiative for some years).

A focus in future years will be the development of a series of training modules on particular sections of the FOI Act, which can be used for generic training, as well as provide the basis for programs designed to meet the needs of individual agencies.

### The Office Website

Due to budget constraints, the Office's first website was created by a staff lawyer without assistance from IT professionals. Although the website held a significant amount of useful information for FOI administrators and users of the Act, it suffered from the absence of a search engine to facilitate quick access to relevant material. A strategy to partially overcome this difficulty was implemented in March 2004. The new "Section Index" lists all decisions published on the website according to the section of the FOI Act considered. This has proven to be of

# Significant issues

particular value to agency decision-makers seeking guidance from previous decisions. From the decision summaries included in the Section Index, they can quickly identify cases with similar fact circumstances to the matter before them, thus informing and improving their decision-making.

This initiative, however, could not fully compensate for the absence of a search engine. In January 2004 a project to re-develop the website was initiated, commencing with a survey of a range of different users (applicants, agencies, law students and staff of the Office) that gathered suggestions for enhancements, as well as identifying those features of the website users considered should be retained.

The successful tenderer for redevelopment of the site has worked closely with the project team, to produce a new design and layout and to develop technical solutions to our “wish-list” of enhanced functions. By the end of the reporting period a “staging” site (functional but not accessible to anyone but the project team) was undergoing testing, and the decisions, publications and other material were in the process of being uploaded to the new site. The new site became operational in August 2004.

A major advantage of the re-developed site will be the capacity, through a “self administration module”, for staff of the Office to update the site from their desktops. This will increase the speed with which new decisions and other publications can be made available to users on the site.

I would like to express my thanks to the State Library, which has generously hosted the old website free of charge for a number of years.

## **Publications and resource materials**

The Office’s newsletter, *vOICe*, which was launched in February 2003, was published three times this year, with issues in September 2003, December 2003 and April 2004. *vOICe* provides FOI practitioners with tips on FOI processing, articles on topics of interest, case summaries from both Queensland and inter-state jurisdictions,

and a discussion forum. Lead articles have considered administrative release of documents, “missing” documents and sufficiency of search, and a discussion of the relationship between the FOI Act and the Queensland public sector’s privacy regime. *vOICe* is distributed electronically to all agencies and other interested persons, as well as being accessible on the Office’s website.

In order to address an identified need for parties to a review to receive clear, straightforward information about how reviews are conducted and what they can expect during the review process, we developed two new brochures. The first, *Information for External Review Applicants*, provides an overview of the role of the Office, who can participate in a review, and brief explanations of the four main steps involved in conducting a review. This brochure also provides information on how to apply for a review and what costs and timeframes are involved. It is sent to all review applicants when we acknowledge receipt of their applications for review.

The second brochure, *Information for External Review Participants (Third Parties)*, is specifically designed to explain the review process to people who are consulted in the course of a review about documents in issue in the review which may be of concern to them.

In April 2004, we published a new Practitioner Guideline on s.44(1) – the personal affairs exemption. This document provides comprehensive guidance to FOI decision-makers and internal reviewers on the application of the exemption. Issues relating to whether or not information can properly be characterised as information concerning an individual’s personal affairs, are also relevant to assessing whether an application fee and processing charges are payable in respect of a particular access application. The analysis of those issues in the new Practitioner Guideline should also be helpful to FOI administrators dealing with application fees and charges.

We also allocated substantial resources in this



# Significant issues

reporting period to developing other Practitioner Guidelines. This will bear fruit in 2004-2005 with the publication of at least six more Practitioner Guidelines. We will also be publishing a number of Information Sheets containing shorter and simpler explanations of FOI issues for members of the public.

## Information and assistance to agencies and members of the public

The Office's staff continue to provide assistance to members of the public and agencies in response to telephone, email, written and, occasionally, face-to-face enquiries. In the reporting period, they dealt with over 400 enquiries.

In responding to enquiries, our officers are able to provide general information (e.g., explanations of procedural issues or the meaning of exemption provisions in the FOI Act) as well as referring people to relevant publications or decisions of the Information Commissioner. It is always made clear that our staff cannot advise on how specific issues should be determined by agencies, as the agency's decision may subsequently become subject to review by the Information Commissioner.

The Liaison Officer program, which has been operating successfully for several years, has also been maintained. Staff members of the Office are allocated primary liaison responsibilities for the 24 agencies which receive high volumes of FOI applications, along with secondary liaison duties for a further 22 agencies. Liaison Officers maintain regular contact with their assigned agencies, through meetings with officers of Brisbane-based agencies and telephone contact with officers of regional agencies. Liaison Officers are the principal point of contact for enquiries from their allocated agencies. Through developing a more detailed understanding of the FOI challenges and dilemmas facing a particular agency, the Liaison Officer is able to provide more appropriate and relevant information.

## 2. Government agencies and commercial affairs

During the reporting period, I issued two decisions which considered the extent to which a government agency can have "commercial affairs" for the purposes of s.45(1)(c) of the FOI Act. In *Re Johnson and Queensland Transport; Department of Public Works (Third Party)* (2004) 6 QAR 307, (summarised at pp.33-34 of this annual report), I expressed the view (at paragraph 51) that a government agency will have business or commercial affairs within the terms of s.45(1)(c) of the FOI Act if, and only to the extent that, it is engaged in a business undertaking carried on in an organised way for the purpose of generating income or profits, or is otherwise engaged in an ongoing operation involving the provision of goods or services on commercial terms for the purpose of generating income or profits.

I applied the same principle in *Re Seeney and Department of State Development; Berri Limited (Third Party)* (Decision No. 04/2004, 29 June 2004, summarised at pp.36-40 of this Annual Report) in concluding that the administration by the respondent Department of the Queensland Investment and Incentive Scheme (the QIIS), and similar financial assistance grants to industry, was a governmental rather than a commercial activity.

A number of inaccurate statements about my decision in *Re Seeney* have been reported in *Hansard* and in the media. I have not responded to these statements because, being an independent review body, I did not wish to become embroiled in a public or political debate about my decision. However, some of the statements impugn the competence of the Information Commissioner's Office and cannot go unanswered.

The first incorrect statement was to the effect that I did not pay sufficient regard to the Victorian Civil and Administrative Tribunal's decision in *Bracks v Department of State Development* [1998] VCAT 579. In that case, VCAT reached the opposite conclusion to mine in *Re Seeney*, when dealing

## Significant issues

with an application by Mr Bracks for access to details of a financial grant made under a comparable Victorian scheme.

In fact it is clear from paragraphs 52-63 of my decision in *Re Seeney* that I gave very careful consideration to the VCAT's decision. As explained in those paragraphs, I could not accept that *Re Bracks* was correctly decided, having regard to the principles stated by Drummond J of the Federal Court of Australia in the case of *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development and Training Centre Pty Ltd* [2001] FCA 382, 4 April 2001, (2002) 66 ALD 514, which had been endorsed on appeal by a Full Court of the Federal Court of Australia. Those decisions of the Federal Court of Australia, given after *Re Bracks*, carry considerably higher persuasive authority than decisions of the VCAT.

The second misconception was that my decision in *Re Seeney* created a precedent that would result in the disclosure of the amount of financial assistance grants to industry in all other cases in which access was sought under the FOI Act. My decision clearly states (at paragraphs 105 and 117) that it relates only to the reasonableness of the Department's arguments against disclosure in respect of the particular grant of financial assistance to Berri Limited (Berri).

In relation to other grants, I specifically stated that there could be a case for secrecy, for an appropriate period of time, and that each case must be evaluated according to its particular circumstances.

In essence, the approach I favoured was that, after an appropriate period of secrecy to overcome any reasonably apprehended prejudicial consequences of premature disclosure (the period to be determined on a case by case basis), the public interest was best served by disclosure of the information necessary to enable a proper evaluation of the cost, as well as the claimed benefits, of particular grants of financial assistance to industry made from public funds.

I considered that, from at least June 2002 (approximately 2 years after acceptance of the grant, and 16 months after the execution of the Financial Assistance Agreement between the State of Queensland and Berri), there was no longer any reasonable basis for expecting prejudicial consequences to follow from disclosure of the amount of the particular grant to Berri. In fact, even the evidence given on behalf of the respondent Department in *Re Seeney* (see paragraph 118) was that 5 years would generally be the appropriate period for maintaining secrecy in respect of the amounts of financial assistance grants.

Since my decision, a new s.47A of the FOI Act, introduced by the *Freedom of Information Amendment Act 2004*, now exempts from disclosure under the FOI Act the amounts of particular grants paid under investment incentive schemes. However, I note the Premier's commitment to Parliament that the grant amounts will be disclosed administratively after 8 years from the date of the grant.

Another stated misconception about my decision in *Re Seeney* is that it has improperly eroded the protection that should be available under the FOI Act for confidential information. The amount of the grant to Berri did not comprise sensitive proprietary information of Berri that had been communicated to the government in confidence. In fact, Berri itself did not oppose disclosure, under the FOI Act, of the amount of the grant. The only commercial information in issue in *Re Seeney* that had been communicated by Berri to the Queensland government, and that Berri still claimed to be commercially sensitive, was found to be exempt under s.46(1)(a) of the FOI Act: see paragraphs 202 and 203 of *Re Seeney*.

Australian law requires that where a government as plaintiff brings an action in equity to restrain an alleged breach of confidence, it must demonstrate that disclosure of the relevant information would cause detriment to the public interest: *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39; the principle was explained in the

## Significant issues

former Information Commissioner's decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at paragraphs 113-118. Moreover, in an action for breach of confidence concerning information supplied to government, our law will recognise a public interest exception. That is, an obligation of confidence asserted to bind a government in respect of information supplied to it, will necessarily be subject to the public's legitimate interest in obtaining information about the affairs of government: *Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995) 183 CLR 10; again the principle was explained in the former Information Commissioner's decision in *Re Cardwell Properties Pty Ltd & Williams and Department of the Premier, Economic and Trade Development* (1995) 2 QAR 671 at paragraphs 51-60.

My reasons for decision in *Re Seeney* (at paragraph 172) make it clear that I accepted that the public interest may not weigh in favour of disclosure where commercial information communicated by a business operator in support of an application for a grant is of such genuine and current commercial sensitivity that competitors could make use of the information to the commercial detriment of the business operator.

Therefore, my reasons for decision could not reasonably cause any concern about the extent of protection available under the FOI Act for confidential information and commercially sensitive information.

Finally, criticism of my decision in *Re Seeney* has not given proper consideration to the addendum to my reasons. During my investigation of the case, my officers' inquiries revealed that the amount of the grant had effectively been disclosed in Berri's audited financial statements. These were available to any interested member of the public (on payment of a fee) through the Australian Securities and Investment Commission (ASIC): see paragraphs A14-A19 of the addendum.

I was satisfied that I could have based my decision, that prejudicial consequences could not reasonably be expected to follow from disclosure under the FOI Act of the amount of the relevant grant to Berri, solely on the ground that the information was available in the public domain. However, the Department requested that I deal fully with its extensive submissions in the case and I acceded to that request.

As I mentioned above, the new s.47A of the FOI Act now exempts from disclosure under the Act the amounts of particular grants paid under investment incentive schemes. However, a high proportion of the recipients of financial assistance grants are corporations that, like Berri, are required to lodge audited financial statements with ASIC. Relevant audit standards require disclosure in a corporation's financial statements of substantial contingent liabilities, such as those created when, as routinely occurs under the Queensland grant schemes, a grant recipient is required to provide an unconditional bank guarantee to secure repayment of the total amount of the grant in the event that agreed performance criteria are not met.

Contingent liabilities for repayment of financial assistance grants to the Queensland government, and indeed to other state governments, may well be effectively disclosed in the audited financial statements of other grant recipients. As I noted in the addendum to my reasons for decision in *Re Seeney*, the amounts of financial assistance grants to Berri from the South Australian and Victorian governments were also effectively disclosed in Berri's audited financial statements.

Therefore, the degree of financial disclosure and accountability required of corporations by the marketplace and corporate regulators may, in many instances, effectively override the government's desire to keep grant amounts secret for eight years, by enabling any interested person to ascertain details of the amounts of incentive grants from publicly available financial disclosures.

# Significant issues

## 3. Inappropriate methods of amending the FOI scheme

In 2003-2004, several pieces of legislation have been introduced or commenced that have, or will have, the effect of making exclusions from, or exemptions under, the FOI Act. The problem is that most people, including FOI practitioners, would be unaware that these pieces of legislation changed or will change the FOI system.

My predecessor, Mr Fred Albietz, in his 1996-1997 Annual Report (at paragraph 3.15), highlighted the problems associated with the practice of making, in other Acts, consequential amendments to the FOI Act, particularly where there is no reference to the amending provision in the FOI Act itself.

Commissioner Albietz referred to s.423(2) of the *WorkCover Queensland Act 1996*, which provided that documents of WorkCover Queensland relating to certain of its commercial activities were excluded from the application of the FOI Act, but with no corresponding provision in the FOI Act itself. He argued that this was liable to produce confusion and uncertainty and that citizens ought to be able to refer to the FOI Act and the *Freedom of Information Regulation 1992 Qld* (the FOI Regulation) to ascertain the precise scope of the entire legislative scheme.

In its December 2001 Report (No. 32) on "Freedom of Information in Queensland", the Legal, Constitutional and Administrative Review Committee (LCARC) of the Legislative Assembly took up these concerns (at pp.252-253):

*Provisions contained in legislation other than the FOI Act or the FOI Regulation have effected exclusions to the Act. This is undesirable as it makes it more difficult for citizens to accurately ascertain the application of the Act, and fails to specifically direct Parliament's attention to the exclusion.*

*It is highly desirable that the entire statutory law on a particular matter be accessible from one statute. If particular bodies are excluded*

*from the FOI Act other than by the Act itself, the effectiveness, cohesiveness and integrity of the Act is threatened and there will be administrative difficulties for decision-makers and applicants alike. Accordingly, the committee believes that any exclusions from the FOI Act should appear in the FOI Act. However, where an exclusion under the FOI Act is relevant to another Act, that other Act should include a reference to the exclusion of the application of the FOI Act.*

LCARC's recommendation no. 216 was that:

*The Attorney-General should take necessary steps to ensure that all current and future exclusions to the Act are contained in the Act and not in other legislation.*

*The recommendations in this chapter, adapted as appropriate, apply equally to exclusions which are currently effected by legislation other than the Act.*

The government's written response to this recommendation, tabled by the Attorney-General and Minister for Justice, stated:

*Adopted. The Attorney-General agrees that it is good practice for current and future exclusions to be contained in the Act wherever possible and not in separate legislation. The Attorney-General will review the current exclusion provisions to identify those exclusions that can be moved to the FOI Act.*

As mentioned above, since that time legislation has been passed that has given rise to the same concerns.

For example, part 2 of the *Police Service Administration (Alcohol and Drug Testing) Amendment Act 2003*, when commenced, will make provision for testing, and random testing, of police officers for alcohol and drugs. A new s.5A.22 of the *Police Service Administration Act* will also provide that:

*The Freedom of Information Act 1992 does not apply to a document created under this part.*

## Significant issues

No provision is made for a corresponding amendment of the FOI Act.

A very clear breach of the principles recommended by LCARC is contained in the new s.107T of the *Sugar Industry Act 1999* (amended by the *Sugar Industry Reform Act 2004*) which provides that:

*A document held, under this part, by the authority in connection with the following is exempt matter under the Freedom of Information Act 1992 –*

- (a) *the giving of periodic estimates;*
- (b) *the making or granting of exemption applications;*
- (c) *the giving of annual returns.*

This provision creates a specialised exemption “under” the FOI Act but does not appear in that Act. It also leaves open to doubt whether an agency that relies on s.107T of the *Sugar Industry Act 1999* to refuse access to documents must comply with the usual obligations on an agency claiming exemption from disclosure under the FOI Act (such as the requirement to give a notice of reasons for a decision), and whether the review rights available under the FOI Act apply.

Section 116 of the recently commenced *Biodiscovery Act 2004* has also created some confusion. Section 116 is an exclusionary provision, that states that the FOI Act does not apply to certain specified categories of documents. Consistently with the LCARC principles stated above, that exclusion should have been effected by amendment of the FOI Act itself. The *Biodiscovery Act* does purport (in ss.130-131) to amend the FOI Act by including a reference to s.116 of the *Biodiscovery Act 2004* in Schedule 1 to the FOI Act. However, Schedule 1 lists secrecy provisions in other legislation that are subject to the application of the s.48 exemption provision in the FOI Act. Section 116 of the *Biodiscovery Act* is clearly not a secrecy provision of that kind because it is confined to excluding specified categories of documents from the application of the FOI Act. Therefore, it should

not have been included in Schedule 1 to the FOI Act.

Sections 130 to 133 of the *Biodiscovery Act* make a similar error, relating to the insertion of a new s.187(3) in the *Gene Technology Act 2001*. This subsection excludes from the application of the FOI Act “confidential commercial information”. Once again, the new s.187(3) has been included in Schedule 1 to the FOI Act, although it is clearly an exclusionary provision rather than a secrecy provision. The exclusion from the FOI Act of “confidential commercial information”, as defined in the *Gene Technology Act*, should have been effected by an amendment of the FOI Act itself.

The examples cited above are, in my view, examples of inappropriate methods of effecting exclusions from, or exemptions under, the FOI Act.

It appears to me that LCARC’s recommendation no. 216, endorsed by the government, needs to be communicated to staff of the Office of Parliamentary Counsel (OPC) and to officers of agencies who provide drafting instructions to the OPC.

I also believe that it would be appropriate for LCARC to be given a role of reviewing in advance any draft legislation that has the effect of providing for exclusions from, or exemptions under, the FOI Act.

# Appendix 1

## Profile of access applicants – finalised external reviews 2003–2004

Type of Applicant	No.	Type of Applicant	No.
Politicians or political staffers	9	Individuals seeking access to their own medical records or records of a dependent child	11
Journalists	7	Individuals seeking access to the medical records of a deceased relative	17
Citizens' groups/lobby groups	15	Individuals seeking information relating to their treatment under the Mental Health Act, or by mental health authorities (e.g., Patient Review Tribunal)	1
Individuals seeking information about public health and safety issues	5	Individuals seeking information related to persons involved with an adopted child	2
Public servants (or former public servants) seeking information about workplace disputes (e.g., grievance, disciplinary proceeding, termination of employment)		Individuals seeking access to information concerning treatment by relevant agencies (e.g., local council or Department of Families, Youth and Community Care) of a neighbourhood dispute or a family dispute.	17
Sub-categories:		Individuals seeking information about how a proposed government decision or policy will affect them, or about a government decision or policy which has affected them	
• Professional employee (e.g. salaried medical practitioner) (1)		Sub-category:	
• Teacher (3)		• Planning and development decisions (6)	46
• Police officer or ex-police officer (0)		Individuals or business organisations seeking access to information for use in pending or proposed legal proceedings	27
• University academic (2)	16	Individuals seeking information about an individual public servant who has had dealings with them	10
Business people or business organisations seeking information for purposes related to their business	21	Agency seeking review of another agency's decision	3
Professionals seeking information about their dealings with a professional regulatory body	1	<b>TOTAL</b>	<b>256</b>
Individuals seeking information about the treatment of their complaints to a professional regulatory body	5		
Individuals seeking information relating to their treatment (or the treatment of a relative) by the QPS, the Crime and Misconduct Commission (CMC) or the courts (i.e. where the access applicant, or a relative, was the subject of investigation)	20		
Individuals seeking information about how their complaint to the QPS or CMC was dealt with	9		
Prisoners or former prisoners (or relatives thereof) seeking information relating to the prisoner's treatment by prison authorities	14		

## Appendix 2

### **New applications for external review received in 2003–2004, by category (as per s.71 of the FOI Act)**

#### **Statement of Affairs (Part 2)**

Refusal to publish, or to ensure compliance with Part 2	0
Deemed refusal	0

#### **Access to documents (Part 3)**

Refusal to grant access	130
Deletion of exempt matter	26
Deemed refusal to grant access	40
Deferred access	0
Charges	9
Third party consulted; objects to disclosure	16
Third party not consulted; objects to disclosure	1

#### **Amendment of records (Part 4)**

Refusal to amend	5
Deemed refusal to amend	4

#### **Issuance of conclusive certificate**

Cabinet matter	0
Executive Council matter	0
Law enforcement/Public safety matter	0

#### **Miscellaneous**

No jurisdiction or misconceived application	56
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<b>TOTAL</b>	<b>287</b>
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# Appendix 3

## Applications for external review received in 2003–2004, by respondent agency or Minister

<b>Ministers</b>	<b>No.</b>	<b>Health agencies</b>	<b>No.</b>
Industrial Relations	1	Queensland Health	12
Natural Resources	1	Health Service Districts:	
		· South Burnett	6
		· Toowoomba	6
		· West Moreton	6
		· Mackay	5
		· Prince Charles Hospital	2
		· Townsville	2
		· Bayside	1
		· Bundaberg	1
		· Cairns	1
		· Gold Coast	1
		· Princess Alexandra Hospital	1
		· QEII Hospital	1
		· Rockhampton	1
		Health Rights Commission	2
		Medical Board of Queensland	6
		<b>Universities</b>	
		The University of Queensland	4
		Queensland University of Technology	2
		Central Queensland University	1
		Griffith University	1
		The University of Southern Queensland	1
		<b>Others</b>	
		Energex	5
		Legal Aid Queensland	5
		Motor Accident Insurance Commission	5
		WorkCover Queensland	5
		Crime & Misconduct Commission	3
		Magistrates Court	2
		Office of the Public Service Commissioner	2
		Anti-Discrimination Commission, Qld	1
		Board of Professional Engineers	1
		Board of Teacher Registration Qld	1
		Director of Public Prosecutions	1
		Ergon Energy	1
		Legal Ombudsman	1
		Port of Brisbane Corporation	1
		Queensland Competition Authority	1
		Qld Industrial Relations Commission	1
		Queensland Law Society	1
		Queensland Ombudsman	1
		Queensland Studies Authority	1
		Residential Tenancies Authority	1
		The Mt Gravatt District Community Support Inc.	2
		Wide Bay Water	1
<b>Departments</b>			
Police	33		
Corrective Services	17		
Communities	11		
Education and the Arts	11		
Justice and Attorney-General	9		
Tourism, Fair Trading and Wine Industry Development	7		
Emergency Services	6		
Public Works, Housing and Racing	6		
Natural Resources, Mines and Energy	5		
Premier and Cabinet	5		
Queensland Rail	5		
Transport	4		
Environmental Protection Agency	3		
Office of State Revenue	3		
Office of the Premier	3		
Primary Industries and Fisheries	2		
State Development and Innovation	2		
Treasury	2		
Employment and Training	1		
Housing	1		
Industrial Relations	1		
Main Roads	1		
Racing	1		
<b>Councils</b>			
Brisbane	7		
Gold Coast	6		
Burdekin	4		
Hervey Bay	3		
Pine Rivers	2		
Redland	2		
Whitsunday	2		
Beaudesert	1		
Cairns	1		
Cambooya	1		
Cooloola	1		
Esk	1		
Gladstone	1		
Hope Vale Aboriginal Council	1		
Ipswich	1		
Logan	1		
Murgon	1		
Noosa	1		
Paroo	1		
Pittsworth	1		



# Appendix 4

## Summaries of formal decisions

### **Readymix Holdings Pty Ltd and Port of Brisbane Corporation; Brisbane Mini Mix Pty Ltd (Third Party)**

(Decision No. 04/2003, 15 December 2003)

The matter in issue consisted of documents relating to a development application lodged by the third party with the respondent seeking approval to construct and operate a concrete batching plant on land at Pinkenba vested in the respondent, including the development application itself and the development approval issued by the respondent.

The respondent refused access to the matter in issue on the basis that it was received or brought into existence by the respondent in carrying out its commercial activities, and thus excluded from the application of the FOI Act by s.11A of the FOI Act and s.486 of the *Transport Infrastructure Act 1994* Qld. Alternatively, the respondent claimed that the matter in issue qualified for exemption from disclosure under s.45(1)(c) of the FOI Act. The third party also claimed that the matter in issue qualified for exemption under s.45(1)(c) of the FOI Act. Additionally, the third party claimed that the matter in issue qualified for exemption under s.44(1) of the FOI Act.

#### **Section 11A of the FOI Act**

The respondent, a GOC, had leased land to the third party, and had approved an application by the third party to develop a concrete batching plant on that land. The respondent argued that these activities were undertaken by it in pursuit of its commercial activities, and that associated documents including those in issue were excluded from the application of the FOI Act by s.11A and s.486 of the *Transport Infrastructure Act*.

The Deputy Information Commissioner found that the process of leasing the respondent's land, and of processing development applications received by the respondent relating to the respondent's land, were materially different and conceptually distinct activities. The Deputy

Information Commissioner noted that, at the time the development application was lodged by the third party, the respondent was required, under the relevant provisions of the *Transport Infrastructure Act* then in force, to assess development decisions as against criteria set out in a Ministerially-approved 'land use plan'.

The Deputy Information Commissioner referred to the provisions of the land use plan which applied at the relevant time, and noted that the respondent was required to take into account a variety of non-commercial factors (such as environmental management, residential amenity and local traffic flows) in assessing development applications for land in the Pinkenba precinct. The Deputy Information Commissioner therefore considered that, while leasing of land may comprise an activity conducted on a commercial basis, the actions of the respondent in receiving, assessing and approving/rejecting a development application must properly be characterised as a public regulatory activity, not as an activity conducted on a commercial basis. Accordingly, the Deputy Information Commissioner decided that the documents in issue were not excluded from the application of the FOI Act.

In view of the above finding, it was therefore necessary for the Deputy Information Commissioner to consider the respondent's and third party's claims for exemption under s.45(1)(c) and s.44(1) of the FOI Act.

#### **Application of s.44(1) of the FOI Act**

The third party claimed that the documents in issue qualified for exemption under s.44(1) of the FOI Act. The Deputy Information Commissioner observed that the words "personal" and "person" as contained in s.44(1) refer only to natural persons, and that accordingly s.44(1) has no application to companies, businesses, clubs or other organisations, which are incapable of having personal affairs as that term is used in s.44(1) of the FOI Act. The Deputy Information Commissioner therefore found that the documents

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in issue did not qualify for exemption from disclosure under s.44(1) of the FOI Act.

### **Application of s.45(1)(c) of the FOI Act**

Both the respondent and the third party claimed that the documents in issue qualified for exemption under this section.

The Deputy Information Commissioner accepted that the documents in issue concerned the business, commercial or financial affairs of the third party (but was not satisfied that any of the matter contained in the documents could be characterised as information concerning the business, commercial or financial affairs of the respondent). The Deputy Information Commissioner was not satisfied that disclosure of the documents in issue could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the third party.

The Deputy Information Commissioner rejected an argument by the third party that disclosure of a small segment of matter in issue, relating to cement trucks to be operated by the third party from the plant, could reasonably be expected to have an adverse effect on the third party's business, commercial or financial affairs. Otherwise, the Deputy Information Commissioner was not satisfied that the respondent or the third party had supplied sufficient evidence or explanation to establish a reasonable basis for expecting that disclosure of any of the documents in issue could reasonably be expected to have an adverse effect on the third party's business, commercial or financial affairs. The Deputy Information Commissioner found that the test for exemption imposed by s.45(1)(c)(ii) was not satisfied, and that the documents in issue did not qualify for exemption under s.45(1)(c) of the FOI Act.

If it had become necessary to apply the public interest balancing test incorporated in s.45(1)(c), the Deputy Information Commissioner observed that the public interest in enhancing the

accountability of the Corporation for its decision-making in respect of development applications, and in enabling any interested member of the public to understand how the impacts of a proposed development on the community and environment had been assessed, would have weighed strongly in favour of a finding that disclosure of the documents in issue would be in the public interest.

### **Johnson and Queensland Transport; Department of Public Works (Third Party)**

(Decision No. 01/2004, 5 January 2004)

The matter in issue comprised segments of three documents relating to the Lang Park redevelopment. The third party claimed that some matter in issue in document (i) was exempt from disclosure to the applicant under s.41(1) of the FOI Act, and that all matter in issue in documents (i), (ii) and (iii) was exempt from disclosure to the applicant under s.45(1)(c) of the FOI Act.

I was satisfied that the matter in issue from document (i) answered the general description in s.41(1)(a) of the FOI Act, being opinion or advice sought from the respondent by the third party's Infrastructure and Major Projects division, for the purposes of the latter's deliberative processes. However, I also considered that the opinion and advice was sought from the Director, Transport Planning – SEQ, because of his expertise in matters of transport infrastructure planning and analysis. I therefore found that the matter in question consisted of expert opinion or analysis, plus some factual matter, and decided that it was excluded from eligibility for exemption under s.41(1), by the operation s.41(2)(b) and s.41(2)(c) of the FOI Act.

I went on to record my views on the application of the public interest balancing test contained in s.41(1) to the matter in issue in document (i). Although the major infrastructure components of the Lang Park redevelopment had been completed, construction of "Infrastructure East" had been deferred by the government pending

## Appendix 4

further advice from the City West Task Force (a joint initiative of the Queensland government and the Brisbane City Council, responsible for producing and implementing a “master plan” for infrastructure and other development in the area immediately west of Brisbane’s central business district, including the Lang Park precinct.). The thrust of the third party’s submissions was that the public interest weighed against disclosure of the matter remaining in issue because the City West Task Force, of which the Director General of Public Works was a member, was still deliberating about the development plan for “Infrastructure East”. Disclosure of the matter in issue (which dated from the early planning stages of the Lang Park redevelopment) would confuse and mislead the public, because it did not represent current thinking of the City West Task Force. In addition, premature disclosure of the matter in issue would prejudice the Task Force’s deliberations by diverting staff from their functions to deal with undue pressure from specific interest groups seeking to influence the Task Force’s deliberations.

I was not satisfied that the matter in issue was capable, if disclosed, of confusing or misleading the public to an extent that warranted a finding that its disclosure would, on balance, be contrary to the public interest. I was also not satisfied that disclosure of the matter in issue was liable to excite activity by speculators and special interest groups to the prejudicial extent suggested by the third party.

I observed that disclosure of preliminary documents relating to policy or planning proposals in development is essential if the FOI Act is to achieve one of its major objects, i.e., promoting informed public participation in the processes of government. Moreover, there was a strong public interest in the accountability of the third party (and other government agencies which had contributed to the project), and in informing the community generally of details of planning proposals that had been considered for Infrastructure East, given the importance of the Lang Park precinct redevelopment for the

community as a whole, its potential impact upon the community, and its significant cost implications for the taxpayers of Queensland.

With respect to s.45(1)(c), I did not accept that the matter remaining in issue in documents (i), (ii) and (iii) could properly be characterised as information concerning the business, commercial or financial affairs of the third party. I said that an agency will have business or commercial affairs within the terms of s.45(1)(c) if, and only to the extent that, it is engaged in a business undertaking carried on in an organised way for the purpose of generating income or profits, or is otherwise engaged in an ongoing operation involving the provision of goods or services on commercial terms for the purpose of generating income or profits.

There was no indication in the relevant material before me that the third party’s Infrastructure and Major Projects Division operated as a commercialised business unit, or that it charged fees for the services it provided to other government agencies in acting as Project Director of the City West development area. The Division did not appear to generate income from charging ‘clients’ for the performance of its services. In acting as Project Director in the terms described in its submissions, the third party was simply discharging the duties and responsibilities allocated to it by government, and funded out of consolidated revenue.

In any event, I was not satisfied that there was a reasonable basis for expecting disclosure of the matter in issue to have the adverse effects asserted by the third party under s.45(1)(c). Even if there were, the balance of public interest clearly favoured disclosure for the reasons referred to in the context of the discussion of the application of s.41(1).

Accordingly, I decided that none of the matter in issue qualified for exemption under s.41(1) or s.45(1)(c) of the FOI Act.

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**Lower Burdekin Newspaper Company Pty Ltd and Burdekin Shire Council and Hansen, Covolo & Cross (Third Parties); Bowtell and Burdekin Shire Council and Lower Burdekin Newspaper Company Pty Ltd (Third Party); Williams and Lower Burdekin Newspaper Company Pty Ltd and Burdekin Shire Council and Hansen, Covolo & Cross (Third Parties); Bowtell and Burdekin Shire Council and Lower Burdekin Newspaper Company Pty Ltd (Third Party); Williams and Burdekin Shire Council and Lower Burdekin Newspaper Company Pty Ltd (Third Party)**

(Decision No. 02/2004, 24 February 2004)

The applicant for access sought information about the salary packages of five Council employees. Two of those employees pursued 'reverse FOI' applications, objecting to the Council's decision to disclose certain information relating to their salary packages.

The documents in issue recorded:

- (a) the position title of each officer;
- (b) the total cost of each officer's 'All Inclusive Salary Package' for the 2001/2002 financial year (plus a footnote clarifying the components of the salary package);
- (c) the total operating costs of the organisational unit relevant to each officer; and
- (d) the cost of each officer's package as a percentage of the total operating cost of the relevant organisational unit.

The Deputy Information Commissioner found that information which would disclose the income of the Council officers was properly to be characterised as information concerning the personal affairs of each officer under s.44(1) of the FOI Act; however, the information about the total operating costs of organisational units of the Council did not concern the personal affairs of any individual and was not exempt under s.44(1).

Applying the public interest balancing test incorporated within s.44(1), the Deputy Information Commissioner decided that, while

there was a public interest in protecting the privacy of each of the Council officers in respect of their salary package information, on balance, the public interest favoured disclosure of the gross cost of salary and benefits paid to the Council officers. Decisions of tribunals applying the FOI legislation of other states supported this approach. The Deputy Information Commissioner observed that the public had a strong, legitimate and abiding interest in having access to sufficient information to enable scrutiny of whether funds raised by government, through imposts on the public, are expended efficiently and effectively in furtherance of the wider public interest. That extended to scrutiny of whether the public is obtaining value for money from performance of the duties of the relevant positions for which the government had decided to allocate funding. This public interest is even stronger in the case of senior officers with responsibility for devising and/or implementing strategic and operational plans, and delivering key performance outcomes.

The Deputy Information Commissioner held that the total value of each officer's salary and benefits did not qualify for exemption from disclosure under the FOI Act, although the Council officers could, if they wished, withhold information revealing whether they elected to take particular non-cash benefits available under the Council's salary packaging arrangements.

**Cannon and The Magistrates Court**

(Decision No. 03/2004, 11 June 2004)

This was a preliminary decision solely on the issue of whether or not I had jurisdiction to review the respondent's refusal to give the applicant access to documents requested by the applicant under the FOI Act.

The applicant sought access to a letter of complaint written to the former Chief Magistrate by the applicant's former wife, complaining about the conduct of a Magistrate who had presided at a preliminary hearing of a dispute involving the applicant and his former wife. The applicant

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also sought access to the Chief Magistrate's letter in response to the letter of complaint. The Magistrates Court refused access to the letters on the basis that the letters were excluded from the application of the FOI Act by s.11(1)(e) of the FOI Act.

I held that, despite the unclear wording used in the relevant sections of the FOI Act, Parliament's intention in enacting s.11(1)(e) and s.11(2) of the FOI Act was that a court, or the holder of a judicial office or other office connected with a court, should not be subject to the obligations imposed on agencies by the FOI Act in respect of documents received or brought into existence in performing the judicial functions of the court, or of the holder of a judicial office or other office connected with a court.

After analysing relevant case law about the difference between judicial functions and administrative functions, I decided that, in receiving the letter of complaint and responding to it, the former Chief Magistrate was performing an administrative function, not a judicial function. The requested documents were therefore not excluded from the application of the FOI Act by s.11(1)(e), and I had jurisdiction under Part 5 of the FOI Act to review the respondent's refusal of access to the requested documents.

### **Seeney and Department of State Development; Berri Limited (Third Party)**

(Decision No. 04/2004, 29 June 2004)

The applicant (a Member of Parliament and Shadow Treasurer) sought access under the FOI Act to documents relating to an application for financial assistance made by the third party in December 1999 under the Queensland Investment and Incentive Scheme (QIIS).

The QIIS is a financial assistance scheme administered by the respondent under which funds can be obtained by companies undertaking projects or planned investment in Queensland if they meet certain eligibility criteria. The

third party applied for, and obtained, financial assistance in connection with the relocation of certain of its operations to the Lytton Industrial Estate. The third party's application did not meet all of the QIIS eligibility criteria, but the third party was awarded a grant of financial assistance under separate funding criteria relating to major/strategic projects. The grant was subject to certain conditions, including the third party committing to the project, and satisfying certain performance criteria including capital expenditure and employment targets.

After concessions from all participants, the matter remaining in issue was categorised as follows:

category 1 matter - comprising references to the actual amount of the financial assistance granted to the third party, and some peripheral matter; category 2 matter - comprising claims for reimbursement (out of the grant monies) submitted by the third party to the respondent (containing details of subcontractors' invoices) evidencing the way in which the grant was spent; category 3 matter - comprising internal financial documents of the third party and other references to its business affairs; and category 4 matter - comprising a memorandum from an officer of the respondent to the Director-General seeking approval to offer the grant to the third party.

The respondent claimed that all of the matter in issue was exempt under s.45(1)(b), s.45(1)(c), s.46(1)(a) and/or s.49 of the FOI Act. The third party only objected to the disclosure of some category 3 matter and the category 4 matter, arguing that it was exempt under s.45(1)(b) or s.45(1)(c) of the FOI Act.

### **Application of s.45(1)(b) of the FOI Act**

I decided that none of the matter in issue qualified for exemption under s.45(1)(b).

As far as the respondent's claim for exemption was concerned, I was not satisfied that, in administering the QIIS, the respondent was

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conducting a commercial activity, such that it could argue that the matter in issue had a commercial value to it within the meaning of s.45(1)(b). Rather, in granting public monies to a private business operator in order to stimulate desirable economic activity, I was satisfied that the respondent was conducting a traditional governmental function. The fact that the overall objective of grants schemes such as the QIIS is to promote commercial activity does not mean that, in making a grant to the third party for that purpose, the respondent was itself engaging in a commercial activity for the purpose of generating income or profits. Although the activity had a commercial appearance as the result of the execution of a formal agreement between the third party and the State of Queensland, the activity in question was a traditional governmental activity.

In making that finding, I followed the decision of Drummond J of the Federal Court of Australia in *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development and Training Centre Pty Ltd* [2001] FCA 382, 4 April 2001, (2002) 66 ALD 514 at paragraphs 58-60 (approved, on appeal, by a Full Court of the Federal Court of Australia). I distinguished the decision of the Victorian Civil and Administrative Appeals Tribunal in *Re Bracks and Department of State Development* [1998] VCAT 579 (15 January 1999).

Although I was of the view that the matter in issue did not have a commercial value to the respondent under s.45(1)(b) because the respondent was not, in administering the relevant financial incentive schemes, engaged in business or commercial activities, I nevertheless went on to consider the respondent's substantive claims for exemption under s.45(1)(b), at the same time as considering the third party's claim for exemption under that provision. The respondent had submitted that the category 1 matter had intrinsic commercial value because it allowed the respondent to set a benchmark or precedent for its grants schemes (both in general sense and in the specific industry) when it came to assessing other projects seeking grants. I held

that whatever value the category 1 matter might still have for the respondent in that regard did not depend on the information being kept secret, and its value in that regard could not be diminished by its disclosure under the FOI Act. The real nub of the respondent's case for keeping the information secret was that, in an environment of competition with the New South Wales, Victorian and overseas governments to attract industry and investment through financial assistance grants, disclosure of the amounts of grants paid to specific businesses would set benchmarks for comparable claims in comparable industries, that:

- (a) could be used by other applicants for assistance to assess a starting point for negotiations over an appropriate grant figure, and to that extent weaken the respondent's negotiating position;
- (b) enable competitor governments to assess the likely terms on which grant assistance would be offered by the respondent, and tailor their offers to outbid Queensland on projects; and
- (c) this would in turn encourage forum shopping by business operators to get the best deal available.

Those arguments did not flow from any intrinsic commercial value attaching to the category 1 matter, and were more appropriate to be assessed under s.47(1)(a) (substantial adverse effect on the ability of government to manage the economy of the State) or s.49 (substantial adverse effect on the financial interests of the State or an agency).

As regards the other categories of matter in issue, I found that none of the matter in question had a current commercial value within the meaning of s.45(1)(b) of the FOI Act which could reasonably be expected to be diminished by its disclosure under the FOI Act. In terms of the third party's claim for exemption under s.45(1)(b), I found that the relevant category 3 and category 4 matter did not have a commercial value to the third party in terms of there being a genuine, arms-length buyer for the information, nor in terms of it being important to the profitability or viability of the third party's business operations.

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Rather, the information in question related to a specific project completed more than three years previously.

### **Application of s.45(1)(c), s.47(1)(a) and s.49 of the FOI Act**

I found that none of the matter in issue was exempt matter under s.45(1)(c), s.47(1)(a) or s.49 of the FOI Act.

For the same reasons as explained in the context of s.45(1)(b), I was not satisfied that the information in issue concerned the business or commercial affairs of the respondent, within the meaning of s.45(1)(c). While it was arguable that the category 1 matter (the amount of the grant) concerned the respondent's financial affairs, I said that, in my view, the better approach was that stated in *Re Johnson and Queensland Transport; Department of Public Works (Third Party)* 2004 6 QAR 307 at paragraphs 51-57; i.e., that the s.45(1)(c) exemption should only apply to agencies to the extent that the relevant agency is engaged in a business undertaking carried on in an organised way for the purpose of generating income or profits, or is otherwise involved in an ongoing operation involving the provision of goods or services for the purpose of generating income or profits. In this case, the activities of the respondent in administering the relevant financial incentive scheme did not fall within either of those descriptions. Nevertheless, I was prepared to evaluate the respondent's case for exemption under s.45(1)(c) as well as s.47(1)(a) and s.49.

As regards the category 1 matter, I observed that the respondent had, in effect, presented a 'class claim' for exemption of the amounts of all grants of financial assistance made by it (as summarised above). I noted the problems associated with making a 'class claim', and stated that I was not satisfied that disclosure of the amount of the particular grant in issue in this case could reasonably be expected to have any of the prejudicial consequences asserted by the respondent. Its precedent value was limited having regard to the particular circumstances

of the relevant grant and there were too many potential variables that could affect the amount of grant assistance that the respondent would be prepared to pay in future cases. I said that even at the time the respondent made its decision in response to the applicant's FOI access application, I did not consider that it was reasonable to expect that disclosure of the amount of the grant awarded to the third party could have the adverse effects contemplated by s.45(1)(c), s.47(1)(a) or s.49 of the FOI Act.

Applying s.45(1)(c) to the category 2 matter, I was not satisfied that disclosure of the relevant information now could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the third party, or on the financial affairs of the respondent.

As for the category 3 matter, it could not properly be characterised as information concerning the respondent's financial affairs because it concerned expenditure by the third party and associated financial implications of the third party's project, *et cetera*. While the information may have been commercially sensitive to the third party while the third party was engaged in negotiating contracts relevant to the relocation of its premises to Lytton, that was no longer the case. I therefore found that any commercial sensitivity that may once have attached to the category 3 matter had dissipated.

Applying s.45(1)(c), s.47(1)(a) and s.49 to the category 4 matter, I noted that any commercial sensitivity that once attached to the segments of information about the third party's business affairs had long since dissipated, and that disclosure could not reasonably be expected to have an adverse effect on the third party's business, commercial or financial affairs. Nor did I consider that there was a reasonable basis for expecting that disclosure at this point in time of information about the respondent's reasons for recommending the grant, could have an adverse effect on the financial affairs of the respondent, or a substantial adverse effect on the ability of government to manage the economy of the State,

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or on the financial interests of the respondent or the State. I therefore found that the category 4 matter did not qualify for exemption under s.45(1)(c), s.47(1)(a) or s.49 of the FOI Act.

Although it was not strictly necessary for me to consider the application of the public interest balancing tests contained in s.45(1)(c), s.47(1)(a) and s.49, I nevertheless addressed the public interest considerations weighing for and against disclosure of the matter in issue, since the applicant and the respondent had provided extensive submissions on that issue. I gave detailed consideration to the Auditor-General's Report No.3 of 2002-03, the Public Accounts Committee's Report No. 61 ("*Commercial-in-confidence arrangements*"), and a speech given in November 2002 by the Chairman of the Productivity Commission ("*Inter-State bidding wars: calling a truce*"). I decided that, with the exception of a small amount of the matter in issue, there were significant public interest considerations favouring disclosure of the matter in issue, primarily, the public interest in enhancing the accountability of the respondent in administering the relevant grants schemes, and enabling interested members of the public to properly assess the costs and benefits of the expenditure of public monies to attract or retain business investment in Queensland.

### **Application of s.46(1)(a) of the FOI Act**

With the exception of the category 3 matter in issue, I found that none of the matter in issue qualified for exemption under s.46(1)(a) of the FOI Act.

The respondent's submissions under s.46(1)(a) invoked primary reliance on a contractual obligation of confidence in clause 22 of the Financial Assistance Agreement between the State of Queensland and the third party. An equitable obligation of confidence was relied upon by the respondent in the alternative.

I noted that clause 22 of the Agreement imposed an obligation on the respondent to treat as

confidential all "commercial intelligence" arising from the project (subject to specific exceptions), but that clause 22.2 specifically reserved to the respondent the right to disclose certain information, including details of the "Financial Assistance" (as defined in the Agreement) and the project. A separate obligation of confidence was imposed on the third party in respect of all information in relation to or in connection with the "Financial Assistance".

I decided that disclosure by the respondent under the FOI Act of the category 1 matter could not found an action by the third party (the third party being the only plaintiff with standing to sue for a breach of clause 22) for breach of a contractual obligation of confidence because of the unilateral and unconditional right of the respondent to disclose that information under clause 22.2. I was not satisfied that any concurrent equitable obligation of confidence binding the respondent would be subject to any different conditions/exceptions to those negotiated and included in the written Agreement. I also noted that there is a public interest exception to an action for breach of confidence concerning information supplied to government, that takes into account the public's legitimate interest in obtaining information about the affairs of government. I reiterated my view that there were strong public interest considerations favouring disclosure of the category 1 matter.

I decided that the category 2 information was too innocuous to have sufficient commercial value or sensitivity to the third party such as to qualify as "commercial intelligence" warranting confidential treatment by the respondent under clause 22.1 of the Agreement. In any event, the category 2 matter answered the description of "details of the Financial Assistance" in clause 22.2, and the respondent was therefore expressly permitted to disclose such information. Accordingly, its disclosure could not found an action for breach of a contractual or equitable obligation of confidence. Similarly, I found that the category 4 matter either could not be described as "commercial intelligence" within clause 22 of



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the Agreement, or was information already in the public domain, or was information that it would be in the public interest to disclose, such that it could not qualify for exemption under s.46(1)(a) of the FOI Act.

However, I considered that the category 3 matter had some commercial sensitivity when it was first communicated to the respondent some 3-4 years earlier, and that the respondent would have been obliged to accord it confidential treatment in accordance with clause 22.1 of the Agreement. While I considered that it had now lost any commercial sensitivity, it had remained secret, and the third party continued to object to its disclosure. I found that the third party was entitled to continue to rely on clause 22.1 of the Agreement which imposed on the respondent a continuing obligation to treat the category 3 matter in confidence. I therefore found that disclosure of the category 3 matter would found an action for breach of a contractual obligation of confidence, and that the category 3 matter therefore qualified for exemption under s.46(1)(a) of the FOI Act.

### Addendum to decision

For reasons explained in an addendum to my decision (which was able to be disclosed to the applicant, and published in accordance with s.89(5) of the FOI Act, only after the respondent withdrew judicial review proceedings in respect of my decision), I was satisfied that the category 1 matter was readily ascertainable from records in the public domain, and that, on that additional ground, the category 1 matter did not qualify for exemption under s.45(1)(b), s.45(1)(c), s.46(1)(a), s.47(1)(a) or s.49 of the FOI Act.

Public companies are required to lodge audited annual financial statements with the Australian Securities and Investment Commission (ASIC). Those financial statements can be obtained or inspected by any interested member of the public on payment of a prescribed fee. Professional standards applying to auditors require that a company's audited financial statements disclose

significant contingent liabilities. The irrevocable bank guarantee which the respondent required Berri Limited to provide to secure repayment of the grant in the event that Berri Limited defaulted on its obligations under the Financial Assistance Agreement, constituted a contingent liability of that kind. The existence of that contingent liability was disclosed in Berri Limited's annual financial statements, with sufficient particulars that (when read in conjunction with other information on the public record – identified in the addendum) the amount of the particular grant in respect of the Lytton project was effectively disclosed.

### Summary of findings

I decided that the category 3 matter in issue was exempt from disclosure under s.46(1)(a) of the FOI Act, but that the rest of the matter in issue was not exempt from disclosure under the FOI Act.

### Liam Walsh as agent for Queensland Newspapers Pty Ltd and Ergon Energy Corporation Ltd (Decision No. 05/2004, 29 June 2004)

The matter in issue in this review consisted of a report commissioned from external consultants by the respondent, in relation to an investigation into allegations of improper behaviour by senior officers employed by the respondent.

The respondent refused access to the report on the basis that it was received or brought into existence by the respondent in carrying out its commercial activities, and was thus excluded from the application of the FOI Act by s.11A of the FOI Act and s.256 of the *Electricity Act 1994* Qld.

The applicant argued that the report had only been received or brought into existence as a consequence of a direction or demand from the Treasurer (one of two shareholding Ministers of the respondent). The applicant therefore submitted that the matter in issue was received or brought into existence by the respondent for the purposes of accounting to its shareholding Ministers, pursuant to the

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reporting and accountability requirements imposed on Government Owned Corporations such as the respondent by the *Government Owned Corporations Act 1993* Qld.

I found on the evidence that the respondent had made an independent decision to commission the external consultants to investigate and report on the various allegations relating to its officers. I was therefore satisfied that the report in issue was not commissioned pursuant to a requirement of the Treasurer.

I considered that the character of the activity carried out by the respondent in commissioning and receiving the report was commercial in nature. While acknowledging that the matter in issue dealt with allegations of improper conduct by employees (and was thus connected to employee management), I noted that those allegations related to senior personnel and their commercial dealings with external contractors, suppliers and service providers. The respondent was seeking to ensure that it was meeting appropriate standards of corporate governance. I was satisfied that the nature of the engagement of the external consultants related to the general business objective of ensuring satisfactory commercial performance and was an inherently commercial activity.

I therefore found that, in commissioning and receiving the report in issue, the respondent was engaged in an activity conducted on a commercial basis. I decided that the report was excluded from the application of the FOI Act by s.11A of the FOI Act and s.256 of the *Electricity Act*.

# Appendix 5

## Summaries of letter decisions

### **Waters and Redland Shire Council**

(387/03, 16 July 2003)

The applicant (a third party objector) lodged an application for external review outside the prescribed 28 day time limit and sought an extension of time under s.73(1)(d) of the FOI Act. Applying the principles stated in *Re Young and Workers' Compensation Board of Qld* (1994) 1 QAR 543, the Deputy Information Commissioner exercised his discretion to grant the requested extension of time.

The applicant objected to the disclosure to her neighbour of documents relating to development approval of a pergola constructed on the applicant's property, contending that the documents concerned the applicant's personal affairs and therefore qualified for exemption from disclosure under s.44(1) of the FOI Act. Although there were public interest considerations favouring disclosure to the applicant's neighbour of information concerning construction work which could affect the amenity of the neighbour's property (which the Council found to be determinative in favour of disclosure to the neighbour), the Deputy Information Commissioner accepted that the applicant had reasonable grounds for arguing that other public interest considerations might ultimately weigh against disclosure. The Deputy Information Commissioner accepted that the applicant should be permitted to argue a case in that regard.

### **Jordan and Gold Coast City Council**

(296/03, 11 August 2003)

The applicant lodged an application for external review outside the prescribed 60 day time limit and sought an extension of time under s.73(1)(d) of the FOI Act. Applying the principles stated in *Re Young and Workers' Compensation Board of Qld* (1994) 1 QAR 543, Assistant Information Commissioner (AC) Moss declined to grant the requested extension of time.

The relevant FOI access application sought access to parts of documents held by the respondent comprising an objection lodged by two third parties to a proposal to name a portion of parkland after the applicant, and which referred to other individuals who had supplied information to the third parties. Applying the principles set out in *Re Byrne and Gold Coast City Council* (1994) 1 QAR 477, AC Moss found that the matter to which the applicant sought access was information concerning the personal affairs of the third parties and the other persons referred to in the objection. AC Moss noted that the applicant had been given access to the substance of the objection, and was satisfied that the disclosure of the parts of the documents in issue would not, on balance, be in the public interest. AC Moss thus found that it would be futile to grant an extension of time as the matter in issue clearly qualified for exemption under s.44(1) of the FOI Act.

### **Price and Department of Justice and Attorney-General**

(S 49/98, 29 August 2003)

The applicant sought access to various categories of documents of the respondent relating to himself, including documents created in relation to his prior FOI access applications. The respondent identified, in its records, reference to a file which appeared from its description to fall within the terms of the applicant's FOI access application. However, the file could not be located. Applying the principles stated in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464, AC Moss was satisfied that the searches and inquiries which the respondent had conducted in an effort to locate the missing file had been reasonable in all the circumstances of the case, and that there were no reasonable grounds for believing that the file still existed in the respondent's possession or under its control.

AC Moss decided that the matter remaining in issue was exempt matter under s.43(1) of the FOI Act. The bulk of it related to litigation involving the applicant in which Crown Law acted for the

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Queensland Police Service (QPS). AC Moss was satisfied that the documents in issue comprised confidential communications between lawyer (Crown Law) and client (QPS) made for the dominant purpose of seeking or giving legal advice or professional legal assistance.

### **Smith and Queensland Rail; 'A' (Third Party)** (S 69/02, 8 September 2003)

The applicant sought access to a report and attachments concerning the investigation by the respondent of a grievance which the applicant had lodged against his supervisor. Following concessions made by several third parties and by the respondent during the course of the review, the only matter remaining in issue comprised two memoranda, written by the third party, which were submitted to the grievance investigators by the supervisor in support of his response to the applicant's grievance. The third party objected to disclosure to the applicant of the memoranda.

As regards the application of s.42(1)(c) of the FOI Act, the third party submitted that the applicant had previously threatened and intimidated him. AC Moss was satisfied that, while the applicant had had workplace disagreements with a number of persons, there was no evidence that the applicant had ever physically harmed the third party or any other person. AC Moss decided that the disclosure of the memoranda could not reasonably be expected to endanger the life or physical safety of the third party or any other person.

As regards the application of s.46(1)(b) of the FOI Act, AC Moss was not satisfied that there was a mutual understanding of confidentiality between the supplier (the third party) and the recipient (the supervisor). Both memoranda contained a specific request from the third party that the supervisor raise directly with the applicant, the complaints contained in the memoranda. In addition, the supervisor had supplied the memoranda to the grievance investigators without further reference to the third party, indicating that the supervisor did not understand the memoranda

to have been communicated in confidence. AC Moss also considered that there was a public interest in disclosure of the memoranda to the applicant as they formed part of the evidence relied upon by the respondent in deciding to dismiss the grievance that the applicant had lodged against his supervisor.

### **Hermann and Department of Employment and Training; 'KLP' (Third Party)** (384/03, 15 September 2003)

The applicant and the third party were both employees of the respondent. The applicant sought access to parts of two documents that contained details of the third party's hours of work and recorded leave. The applicant sought access to that information in connection with grievances which he had lodged against his manager. He wished to establish whether or not the third party was at work on a particular day in 2001 when the applicant had had an altercation with his manager. The third party had provided evidence to the effect that she was at work that day, and had witnessed the altercation. The applicant contended that the third party was, in fact, absent from the office on sick leave on the day in question and could not have witnessed the altercation.

The relevant parts of the applicant's grievances were dismissed by the respondent, and the applicant then lodged a fair treatment appeal with the Public Service Commissioner. The applicant's appeal, on the ground to which the matter in issue was relevant, was dismissed. The applicant submitted that the information to which he sought access would support an appeal by him against the dismissal of his fair treatment appeal.

Applying the principles in *Re Stewart and Department of Transport* (1993) 1 QAR 227 and *Re Rynne and Department of Primary Industries* (Deputy Information Commissioner Qld, Decision No. S 192/98, 11 January 2002, reported on the Information Commissioner's website), AC Moss found that the matter in issue concerned

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the personal affairs of the third party and was therefore prima facie exempt from disclosure under s.44(1) of the FOI Act. However, AC Moss decided that disclosure of the matter in issue would, on balance, be in the public interest. AC Moss considered that, given the conflicting information contained in the matter in issue surrounding the third party's presence at, or absence from, work on the day in question, and the possible relevance of that issue to the applicant's case, the applicant had a sufficient "need to know" such as to weigh in favour of giving him an opportunity to examine the matter in issue and to satisfy himself about what those records indicated (see *Re Pemberton and University of Queensland* (1994) 2 QAR 293 at pp. 368-377).

### **Gray and Mount Isa City Council** (388/03, 24 September 2003)

The applicant raised a 'sufficiency of search' issue regarding the existence of additional documents concerning the respondent's investigation of a noise complaint made against the applicant. Applying the principles stated in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464, AC Moss was satisfied that the searches and inquiries which the respondent had conducted in an effort to locate additional documents responsive to the terms of the applicant's FOI access application had been reasonable in all the circumstances of the case, and that there were no reasonable grounds for believing that additional documents existed in the respondent's possession or under its control.

### **Cannon and The Magistrates Courts** (517/03, 31 October 2003)

The applicant contended that he had made an FOI access application to the respondent which the respondent had failed to process. The Deputy Information Commissioner decided that, in the context of the applicant's correspondence with the respondent, the applicant's request for information could not objectively and reasonably be interpreted as a request for access

to documents under the FOI Act. The Deputy Information Commissioner also commented that, even assuming that a valid FOI access application had been made, the applicant had not lodged a written application for review by the Information Commissioner under s.79(1) after the expiry of the time limit specified in s.27(4) of the FOI Act. Nor had the applicant paid an application fee in respect of the purported access application, even though the information sought was clearly non-personal in nature.

### **"GDW" and Queensland Police Service** (373/03, 20 November 2003)

The applicant sought access to documents concerning two complaints made to the respondent by the applicant's daughter. Both complaints concerned allegations of sexual abuse. Applying the principles in *Re Stewart and Department of Transport* (1993) 1 QAR 227, AC Moss found that the matter in issue was properly to be characterised either as information which solely concerned the personal affairs of persons other than the applicant, or as information which concerned the shared personal affairs of the applicant and other members of her family. AC Moss referred to the principles in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 regarding shared personal affairs matter, and decided that all of the matter in issue was prima facie exempt from disclosure under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated within s.44(1). AC Moss then evaluated the public interest considerations weighing for and against disclosure of the matter in issue, and decided that disclosure of the matter in issue would not, on balance, be in the public interest.

### **Keast and South Burnett Health Service District** (569/03, 26 November 2003)

The applicant sought access to segments of information in documents that concerned his dealings with the Kingaroy Community Health

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Service. Following negotiations with the applicant, the respondent and a third party, the respondent agreed to give the applicant access to some matter and the applicant withdrew his application for some matter. As a result, the matter remaining in issue comprised a segment of 10 words in one document. Applying the principles in *Re Stewart and Department of Transport* (1993) 1 QAR 227, AC Moss found that the matter in issue was properly to be characterised as information which concerned the personal affairs of a person other than the applicant for access, and that the matter in issue was *prima facie* exempt from disclosure under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated within s.44(1). AC Moss then evaluated the public interest considerations weighing for and against disclosure of the matter in issue, and decided that disclosure of the matter in issue would not, on balance, be in the public interest.

### **Price and Gatton Shire Council** (21/03, 23 December 2003)

The applicant sought access to video tape recordings from the respondent's internal and external security monitoring cameras for a certain period on 8 April 2002. As regards the external camera tape recording, after reviewing the information and evidence provided by the respondent, AC Moss was satisfied that no recording had been made on 8 April 2002 due to an error on the part of an officer of the respondent. Accordingly, AC Moss found that there were no reasonable grounds for believing that the tape recording requested by the applicant existed in the possession or under the control of the respondent, and that the searches and inquiries made by the respondent in an effort to locate the recording had been reasonable in all the circumstances of the case.

As regards the relevant internal camera tape recording, the respondent was unable to locate the requested tape and contended that it was likely that it had been erased on or around the time of the adoption by the respondent of its

"Meeting recording policy" on 15 May 2002. On the basis of the material provided by the respondent, AC Moss found that there were no reasonable grounds for believing that the tape recording requested by the applicant existed in the possession or under the control of the respondent, and that the searches and inquiries made by the respondent in an effort to locate the recording had been reasonable in all the circumstances of the case.

### **Wilson and Toowoomba Health Service District; Wilson (Third Party)** (541/03, 6 January 2004)

The applicant sought access to the medical records of her adult daughter (the third party). The third party objected to disclosure to the applicant of the records. Applying the principles in *Re Stewart and Department of Transport* (1993) 1 QAR 227, AC Moss found that the matter in issue was properly to be characterised as information which concerned the personal affairs of the third party, or information which concerned the shared personal affairs of the applicant and the third party. As regards the shared personal affairs matter, AC Moss found that the information which concerned the applicant was inextricably interwoven with information which concerned the personal affairs of the third party. Accordingly, all matter in issue was *prima facie* exempt from disclosure under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated within s.44(1). AC Moss then evaluated the public interest considerations weighing for and against disclosure of the matter in issue, and decided that disclosure of the matter in issue would not, on balance, be in the public interest.

### **Wilson and Education Queensland** (630/03, 7 January 2004)

The applicant sought access to certain educational records relating to her adult daughter. The applicant's daughter objected to the disclosure to the applicant of those records. Applying the principles in *Re Stewart*

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and *Department of Transport* (1993) 1 QAR 227, AC Moss found that the matter in issue was properly to be characterised as information which concerned the daughter's personal affairs, and therefore was prima facie exempt from disclosure under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated within s.44(1). AC Moss then evaluated the public interest considerations weighing for and against disclosure of the matter in issue, and decided that disclosure of the matter in issue would not, on balance, be in the public interest.

### **Stiller and Department of Justice and Attorney-General; "RDR" (Third party); A Referee (Fourth party)**

(S 113/02 [2/03], 12 January 2004)

The applicant sought access to certain documents concerning the prosecution and sentencing of the third party in the District Court in relation to offences committed against minors. The documents in issue comprised a psychiatrist's report about the third party, character references provided to the Court in support of the third party, and parts of statements by five police officers involved in the investigation of the third party.

Applying the principles stated in *Re Stewart and Department of Transport* (1993) 1 QAR 227, the Deputy Information Commissioner found that, with the exception of some matter contained in the psychiatrist's report concerning the psychiatrist's professional qualifications *et cetera*, the matter in issue was properly to be characterised as information concerning the personal affairs of persons other than the applicant. Hence that it was *prima facie* exempt from disclosure to the applicant under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.44(1).

The Deputy Information Commissioner discussed in detail the various public interest considerations weighing for and against disclosure of the matter in issue. As regards the psychiatrist's report, the Deputy Information Commissioner considered

that, in respect of those parts of the report which had been reproduced in the transcript of the District Court hearing or in the Court of Appeal's judgment, the weight of the public interest in protecting the third party's privacy interests had been significantly reduced. Balancing the reduced weight of the third party's privacy interests against the public interest in open justice and accountability of the criminal justice system, the Deputy Information Commissioner was satisfied that the disclosure of the relevant parts of the report would, on balance, be in the public interest. However, as regards those parts of the report which had not been published, the Deputy Information Commissioner was not satisfied that disclosure would, on balance, be in the public interest, and those parts were found to be exempt under s.44(1) of the FOI Act.

As to the character references, the Deputy Information Commissioner considered that, with the exception of information relating to the third party's wife and other family members, disclosure of the references, including the authors' signatures, would enhance the public interest in scrutiny and accountability of the criminal justice system, such that disclosure would, on balance, be in the public interest. Accordingly, the Deputy Information Commissioner decided that the bulk of the information contained in the references did not qualify for exemption under s.44(1) of the FOI Act.

As to the matter in issue in the police statements, given the fact that the third party had pleaded guilty to the offences with which he was charged, together with the amount and type of information which was already publicly available in the form of the transcript of the District Court proceedings and the Court of Appeal's judgment, the Deputy Information Commissioner considered that the weight to be attributed to the public interest in protecting the third party's privacy in respect of the matter in issue was minimal. He considered that disclosure would enhance the accountability of the Queensland Police Service and the Director of Public Prosecutions regarding their investigation and prosecution of the third party.

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The Deputy Information Commissioner therefore decided that disclosure of the matter in issue in the police statements would, on balance, be in the public interest and that it did not qualify for exemption under s.44(1) of the FOI Act.

### **Wong and Medical Board of Queensland** (385/03, 22 January 2004)

The applicant sought access to documents that concerned her health assessment and the decision of the respondent to de-register her as a medical practitioner. The applicant raised a number of 'sufficiency of search' issues. The respondent was unable to locate one folio that was listed as an attachment to a particular letter, and the applicant also asserted that certain reports and other documents relating to the supervision of her while she was employed as a medical practitioner at a medical centre had not been located or dealt with by the respondent. Applying the principles stated in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464, AC Moss was satisfied that the searches and inquiries which the respondent had conducted in an effort to locate the requested documents had been reasonable in all the circumstances of the case, and that there were no reasonable grounds for believing that there were any additional relevant documents in the respondent's possession or under its control.

AC Moss decided that the matter remaining in issue was exempt matter under s.43(1) of the FOI Act, as that matter comprised confidential communications between the respondent and its solicitors made for the dominant purpose of obtaining or giving legal advice or professional legal assistance.

### **Keast and South Burnett Health Service District** (570/03, 3 February 2004)

The applicant sought access to documents concerning requests by the respondent for legal advice, and responses provided by the Legal and Administrative Law Unit (LALU) of

Queensland Health. AC Moss decided that the matter in issue was exempt matter under s.43(1) of the FOI Act because it comprised confidential communications between lawyer and client made for the dominant purpose of obtaining or giving legal advice or professional legal assistance. AC Moss was satisfied that the LALU officers who provided legal advice to the respondent were appropriately qualified and employed as legal officers by Queensland Health, and that there was a professional relationship of solicitor and client between the officers of LALU and the respondent which secured to the legal advice an independent character. AC Moss considered and dismissed the applicant's various arguments regarding why the matter in issue could not attract legal professional privilege, including the 'improper purpose' exception and waiver.

### **Purvey and the University of Queensland** (29/04, 9 February 2004)

The applicant sought access to a number of documents (including video-taped records of interviews with students) provided to, or created by, a review committee which reviewed the respondent's School of Journalism and Communication. The respondent failed to make a decision on access within the prescribed time and the applicant applied for external review. The respondent requested an extension of time within which to make a decision, citing difficulties in consulting with third parties, and in having the records of interview converted to a conventional VHS video format. The applicant opposed the respondent's application, contending that the respondent had had ample time to deal with his application, and that the request for an extension of time was a delaying tactic which was further evidence of the respondent's intention to deny him access to any documents. AC Barker exercised her discretion to grant the respondent a short extension of time, as it had completed the necessary work and was in a position to advise the applicant of its decision.



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### **Carter and Gold Coast City Council**

(696/03, 7 April 2004)

The applicant sought access to four categories of documents which he contended that an officer of the respondent would have referred to when responding to an inquiry from the Queensland Ombudsman. In addition, the applicant sought access to a letter from the respondent's Chief Executive Officer to the applicant and/or his wife, concerning an instruction from the CEO that staff of the respondent not engage in any further discussions with the applicant.

The officer of the respondent advised that he did not refer to any documents when responding to the inquiry from the Ombudsman's office (which was made by telephone), but had relied on his memory and prior knowledge of the relevant issues, gained through extensive dealings with the applicant. That officer also advised that, to the best of his recollection, the instruction from the CEO, regarding future dealings with the applicant, was verbal, and was not contained in any letter from the CEO to the applicant and/or his wife. Furthermore, a search of the respondent's files had failed to locate such a letter.

AC Moss found that there were no reasonable grounds for believing that there existed, in the respondent's possession or under its control, documents that fell within the terms of the applicant's FOI access application. AC Moss was satisfied that the searches and inquiries which the respondent had conducted in an effort to locate any responsive documents had been reasonable in all the circumstances of the case.

### **"DLN" and Queensland Police Service**

(74/04, 16 April 2004)

The applicant sought access to a statement made to the respondent by his former wife concerning an alleged domestic incident that involved the applicant, his former wife, and their children. Applying the principles in *Re Stewart and Department of Transport* (1993) 1 QAR 227, AC Moss found that the matter in issue was properly

to be characterised either as information which solely concerned the personal affairs of persons other than the applicant, or as information which concerned the shared personal affairs of the applicant and other members of his family. AC Moss referred to the principles in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 regarding shared personal affairs matter, and decided that all of the matter in issue was *prima facie* exempt from disclosure under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated within s.44(1). AC Moss then evaluated the public interest considerations weighing for and against disclosure of the matter in issue, and decided that disclosure of the matter in issue would not, on balance, be in the public interest.

### **Green and Gold Coast Health Service District; 'RHM' (Third Party)**

(718/03, 12 May 2004)

The matter in issue in this review comprised small segments of matter contained in the third party's hospital admission record. Extensive efforts were made to locate the third party and to inform her of the Information Commissioner's review, without success. The respondent withdrew its claim for exemption in respect of the matter in issue, and the Deputy Information Commissioner therefore decided to give the applicant access to the matter in issue, which also affected and concerned the applicant.

### **Byers and Queensland Health**

(110/04, 13 May 2004)

AC Moss was satisfied that, as some of the documents to which the applicant sought access contained no information that could properly be characterised as information concerning the applicant's personal affairs, the applicant was required to pay, under s.29 of the FOI Act and s.6 of the FOI Regulation, a \$33.50 application fee in respect of her FOI access application. AC Moss also found that the applicant was required to pay, under s.29(2) of the FOI Act and s.8(1) of the FOI Regulation, \$6.40 in photocopying charges

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in respect of the 32 pages that contained no information that could properly be characterised as information concerning the applicant's personal affairs.

AC Moss found that the applicant was not entitled to a waiver of the application fee or photocopying charges under s.29(3) of the FOI Act and s.10(2) of the FOI Regulation because the applicant did not hold a concession card as defined in s.10(5) of the FOI Regulation. Even if it were to be accepted that s.29B(2) of the FOI Act reserves a general discretion to agencies to waive or reduce charges, AC Moss was not satisfied that there was a sufficient public interest to justify doing so in this case.

### **'RCH' and Queensland Police Service** (451/03, 31 May 2004)

The applicant sought access to a "running sheet" that was prepared by the respondent during its investigation into the death of the applicant's wife (the applicant was convicted of the murder of his wife and was serving a term of imprisonment). The matter in issue related mainly to persons whom the respondent had contacted, or obtained information from, in the course of its investigation. Applying the principles stated in *Re Pearce and Queensland Rural Adjustment Authority* (1999) 5 QAR 242 and *Re Stewart and Department of Transport* (1993) 1 QAR 237, AC Moss was satisfied that the matter in issue was properly to be characterised as information concerning the personal affairs of the relevant persons, and was *prima facie* exempt from disclosure under s.44(1) of the FOI Act. AC Moss then considered the public interest arguments raised by the applicant in favour of disclosure of the matter in issue and decided that disclosure would not, on balance, be in the public interest.

### **Price and Crime and Misconduct Commission** (411/03, 2 June 2004)

The applicant sought access to documents relating to an investigation by the respondent into

allegations of official misconduct. The documents in issue comprised an investigation report, correspondence, and tape-recorded interviews and written summaries of interviews prepared during the investigation. With respect to matter in issue that would identify persons who had made complaints to the respondent, or who had provided the respondent with information during the course of its investigation, AC Moss decided that such matter concerned the personal affairs of those persons and therefore was *prima facie* exempt from disclosure under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated within s.44(1).

AC Moss considered that the public interest in protecting the privacy of the persons concerned, together with the strong public interest in protecting the continued flow of information to law enforcement agencies from concerned members of the community regarding allegations of possible wrongdoing, outweighed any public interest considerations weighing in favour of disclosure to the applicant of the matter in issue. AC Moss therefore decided that disclosure of the matter in issue would not, on balance, be in the public interest and that it therefore qualified for exemption under s.44(1) of the FOI Act.

### **Stenhouse and Department of Education and the Arts**

(274/04, 10 June 2004)

The applicant sought access to all documents relating to his son and to records disclosing names and professional qualifications of staff of the respondent who had had dealings with his son. The respondent failed to make a decision on access within the prescribed time and the applicant applied for external review of the respondent's deemed refusal of access. The respondent made an application under s.79(2) of the FOI Act for an extension of time within which to make a decision. The applicant contended that the respondent had had sufficient time to deal with the application, and that, in seeking an extension of time, the respondent was further

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delaying the applicant's access to documents. The Deputy Information Commissioner granted the respondent a short extension of time on the basis that the large number of documents that were responsive to the applicant's access application, and the need to undertake consultations under s.51 of the FOI Act, justified the grant of additional time. Moreover, the respondent had virtually completed the necessary work and would shortly be in a position to give the applicant notice of its decision.

### **Price and Crime and Misconduct Commission** (58/04, 15 June 2004)

The applicant sought access to a wide range of documents, covering a variety of persons, organisations, incidents and issues. In respect of the various 'sufficiency of search' issues raised by the applicant, AC Moss was satisfied that there were no reasonable grounds for believing that the respondent had in its possession or under its control, any additional responsive documents, and that the searches and inquiries conducted by the respondent in an effort to locate any such documents had been reasonable in all the circumstances of the case.

To the extent that the applicant was seeking access to documents that had been dealt with in previous decisions given by the Information Commissioner (or his delegates), AC Moss found that the applicant's request in that regard was frivolous and vexatious, and she declined to deal with it further, invoking s.77(1) of the FOI Act.

### **Ward and Department of Corrective Services** (338/04; 345/04; 346/04; 347/04, 17 June 2004)

Having regard to staffing and administrative difficulties in the respondent's FOI unit, and the lack of any objection from the applicant, the Deputy Information Commissioner decided that it was appropriate to grant the respondent's application, under s.79(2) of the FOI Act, for an extension of time within which to deal with the applicant's four FOI access applications.

### **Tolhurst and Queensland Rail; Robertson (Third party)**

(112/04, 24 June 2004)

### **Robertson and Queensland Rail; Tolhurst (Third party)**

(117/04, 24 June 2004)

These applications related to a grievance investigation conducted by the respondent. The applicant and the third party were parties to the grievance. In application for review 112/04, the applicant sought review of the respondent's decision to give the third party access to some information contained in the report that had been prepared by the investigators. In application for review 117/04, the applicant sought review of the respondent's decision to refuse her access to some information contained in the investigators' report.

AC Moss decided that none of the matter in issue qualified for exemption from disclosure under s.44(1) or s.46(1) of the FOI Act. As regards the application of s.44(1) to the matter in issue in review 112/04, AC Moss was satisfied that none of the matter in issue could properly be characterised as information concerning the applicant's personal affairs. Rather, it concerned aspects of his employment affairs.

As regards the application of s.46(1) to the matter in issue in review 117/04, AC Moss found that none of the matter in issue had been communicated in confidence as against the applicant, who was the person who had lodged the grievance. While it may have been reasonable for the third party to expect that the information he provided to the investigators would be kept confidential from the world at large, it was not reasonable for him to expect that it would be kept confidential from the applicant, given that it was supplied during the course of the respondent's investigation of the applicant's grievance, and given the respondent's duty to accord the applicant procedural fairness in investigating, and making a decision in response to, her grievance.

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### **Malone and Townsville Health Service District** (290/04, 30 June 2004)

The applicant purported to lodge an application for external review approximately 100 days outside the 60 day time limit prescribed in the FOI Act. She sought an extension of time under s.73(1)(d) of the FOI Act within which to lodge that application.

The relevant FOI access application sought access to medical records of the applicant's deceased father. The Deputy Information Commissioner found that the matter to which the applicant sought access was properly to be characterised as information concerning the personal affairs of the applicant's father and was therefore *prima facie* exempt from disclosure to the applicant under s.44(1) of the FOI Act. As to the public interest balancing test incorporated within s.44(1), the Deputy Information Commissioner considered the public interest considerations identified by the applicant as weighing in favour of disclosure to her of the matter in issue, namely, that disclosure would allow her to "close" her relationship with her father, and to assess whether any possible legal or compensatory action lay against the respondent. The Deputy Information Commissioner decided (applying *Re Summers and Cairns District Health Services and Michael Hintz* (1997) 3 QAR 479) that the first consideration could not properly be characterised as a public interest consideration, but rather, was a personal interest of the applicant. The Deputy Commissioner also found that there was nothing in the matter in issue that would assist the applicant to pursue any remedy against the respondent regarding its treatment of the applicant's father.

In view of the extent of the delay, which was largely unexplained, and the fact that he was not satisfied that the applicant had a reasonably arguable case with reasonable prospects of success, the Deputy Information Commissioner applied the principles in *Re Young and Workers' Compensation Board of Qld* (1994) 1 QAR 543 and declined to exercise his discretion to grant the

requested extension of time under s.73(1)(d) of the FOI Act.

### **Tanner and Gold Coast City Council** (231/04, 30 June 2004)

The applicant sought access to the identity of a person who complained to the respondent about the applicant's unregistered dog. (The dog was of a breed not allowed to be kept on the Gold Coast and was subsequently removed from the applicant's home.) The applicant stated during the course of the review that she did not want to pursue access to the identity of any genuine complainant. However, she maintained that the respondent was concealing the identity of an officer of the respondent who had visited the applicant's home, and whom the applicant believed was the real source of the complaint. AC Barker decided that the matter in issue, comprising the name and the initials of the complainant, was exempt matter under s.42(1)(b) of the FOI Act. The name and initials were not those of any officer of the respondent who investigated the complaint or ordered the removal of the dog.



# Notes